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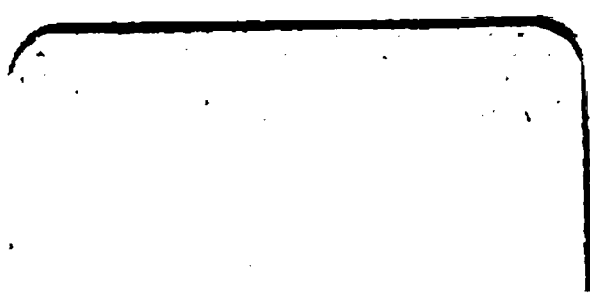
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. XLIX.

CONTAINING ALL CASES OF GENERAL AUTHORITY IN THE FOLLOWING
REPORTS:

73 ALABAMA; 74 ALABAMA; 63 CALIFORNIA; 64 CALIFORNIA;
7 COLORADO; 96 INDIANA; 97 INDIANA; 98 INDIANA; 62
IOWA; 32 KANSAS; 13 LEA; 76 MAINE; 136 MASSACHU-
SETTS; 79 MISSOURI; 16 NEBRASKA; 60 NEW HAMP-
SHIRE; 97 NEW YORK; 91 NORTH CAROLINA; 103
PENNSYLVANIA STATE; 104 PENNSYLVANIA
STATE; 15 TEXAS COURT APPEALS; 16
TEXAS COURT APPEALS; 78 VIRGINIA;
24 WEST VIRGINIA.

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SCHEDULE

OF STATE REPORTS FROM WHICH CASES HAVE BEEN SELECTED FOR THE AMERICAN REPORTS.

The volumes of State Reports are in parenthesis, and the volumes of American Reports in heavy letter.

- Alabama (44) 4; (45) 6; (46) 7; (47) 11; (48) 17; (49, 50) 20; (51, 52) 23; (53, 54) 25; (55, 56) 28; (58) 29; (59, 60) 31; (61) 32; (62) 34; (63) 35; (64) 38; (65) 39; (66) 41; (67) 42; (68, 69) 44; (71) 46; (72) 47; (73, 74) 49.
- Arkansas (25) 4; (26) 7; (27) 11; (28) 18; (29, 30) 21; (31) 25; (32) 29; (33) 34; (34) 36; (35) 37; (36) 38; (37) 40; (38) 42; (39) 43; (40, 41, 42) 48.
- Baxter (Tenn.) (1) 25; (2) no cases; (3, 4) 27; (5) 30; (6, 7) 32; (8) 35; (9) 40.
- Bush (Ky.) (7) 3; (8) 8; (9) 15; (10) 19; (11) 21; (12) 23; (13) 26; (14) 29.
- California (39) 2; (40) 6; (41, 42) 10; (43, 44, 45, 46) 13; (47, 48) 17; (49, 50) 19; (51) 21; (52) 23; (53) 31; (54) 35; (55) 36; (56) 38; (57) 40; (58) 41; (59) 43; (60, 61) 44; (62) 45; (63, 64) 49.
- Colorado (1) 9; (2, 3) 25; (4) 34; (5) 40; (6) 45; (7) 49.
- Connecticut (36) 4; (37, 38) 9; (39) 12; (40, 41) 16; (42, 43) 19; (44) 21; (45) 26; (46) 29; (47) 33; (48) 36; (49) 40; (50) 44; (51) 47.
- Florida (13) 7; (14) 14; (15) 21; (16) 26; (17) 35; (18) 48; (19) 45.
- Georgia (40) 2; (41, 42) 5; (43, 44) 9; (45, 46) 12; (47, 48, 49, 50) 15; (51, 52, 53, 54, 55, 56) 21; (57, 58) 24; (59, 60) 27; (61) 34; (62) 35; (63) 36; (64) 37; (65) 38; (66) 42; (67) 44; (68) 45; (69) 47; (70) 48.
- Grattan (Va.) (20) 3; (21) 8; (22) 12; (23) 14; (24, 25) 18; (26, 27) 21; (28, 29) 26; (31) 31; (30) 32; (32) 34; (33) 36.
- Heiskell (Tenn.) (1) 2; (2) 5; (3) 8; (4, 5) 13; (6, 7) 19; (8, 9) 24; (10, 11, 12) 27.
- Houston (Del.) (3) 11; (4) 15.
- Illinois (51) 2; (52) 4; (53, 54) 5; (55, 56) 8; (57, 58) 11; (59, 60, 61, 62, 63) 14; (64, 65, 66, 67) 16; (68, 69) 18; (75, 76, 77, 78) 20; (70, 71, 72, 79, 80) 22; (73, 74)* 24; (81, 82, 83, 84) 25; (85) 28; (86, 87) 29; (88) 30; (89) 31; (90) 32; (91) 33; (92, 93, 94) 34; (95) 35; (96) 36; (97) 37; (98) 38; (99, 100) 39; (101, 102) 40; (103) 42; (104, 105) 44; (106) 46; (107) 47; (108) 48.
- Indiana (32) 2; (33) 5; (34) 7; (35) 9; (36, 37, 38) 10; (39, 40, 41, 42, 43) 12; (44, 45, 46) 15; (47, 48) 17; (49, 50, 51) 19; (52, 53) 21; (54, 55) 23; (56, 57, 58, 59) 26; (60, 61) 28; (62, 63) 30; (64) 31; (65, 66) 32; (67) 33; (68) 34; (69) 35; (70, 71) 36; (72) 37; (73) 38; (74, 75) 39; (76, 77) 40; (78, 79, 80) 41; (81, 82) 42; (83, 84) 43; (85, 86, 87) 44; (88) 45; (89, 90, 91) 46; (92, 93) 47; (94, 95) 48; (96, 97, 98) 49.
- Iowa (27) 1; (28, 29) 4; (30) 6; (31, 32) 7; (33, 34) 11; (35, 36) 14; (37, 38, 39) 18; (40, 41, 42) 20; (43) 22; (44, 45) 24; (46) 26; (47) 29;

*The hiatus in the Illinois Reports arises from the fact that the volumes between the 69th and the 75th were published after the 75th and three succeeding volumes.

- (48) 20; (49) 21; (50) 22; (51) 23; (52) 25; (53) 26; (54) 27; (55) 29; (56) 41; (57) 42; (58) 43; (59) 44; (60) 46; (61) 47; (62) 49.
- Kansas** (5, 6) 7; (7, 8, 9) 12; (10, 11, 12) 15; (13, 14) 19; (15, 16, 17) 22; (18) 26; (19, 20) 27; (21) 30; (22) 31; (23) 32; (24) 36; (25) 37; (26) 40; (27) 41; (28) 42; (29) 44; (30) 46; (31) 47; (32) 49.
- Kentucky** (78) 39; (79) 42; (80) 44.
- Lea (Tenn.)** (1) 27; (2, 3) 31; (4, 5, 6, 7) 40; (8) 41; (9) 42; (10) 43; (11, 12) 47; (13) 49.
- Louisiana** (22) 2; (23) 8; (24, 25) 13; (26, 27) 21; (28) 26; (29) 29; (30) 31; (31) 33; (32) 36; (33), 39; (34) 44; (35) 48.
- MacArthur (District of Columbia)** (1, 2) 29; (3) 36.
- Mackey (District of Columbia)** (1, 2) 47.
- MacArthur and Mackey (District of Columbia)** 48.
- Maine** (57) 2; (58) 4; (59) 8; (60) 11; (61) 14; (62) 16; (63, 64) 18; (65) 20; (66) 22; (67) 24; (68) 28; (69) 31; (70) 35; (71) 36; (72) 39; (73) 40; (74) 43; (75) 46; (76) 49.
- Maryland** (31) 1; (32, 33) 3; (34, 35) 6; (36, 37) 11; (38, 39, 40) 17; (41, 42, 43) 20; (44) 22; (45, 46) 24; (47) 28; (48) 30; (49, 50) 33; (51) 34; (52, 53) 36; (54, 55) 39; (56, 57) 40; (58) 42; (59) 43; (60) 45; (61) 48.
- Massachusetts** (100) 1; (101, 102) 3; (103) 4; (104) 6; (105) 7; (106) 8; (107) 9; (108) 11; (109) 12; (110) 14; (111, 115) 15; (112, 116) 17; (113) 18; (114, 117, 118, 119) 20; (120) 21; (121, 122) 23; (123) 25; (124) 26; (125) 28; (126) 30; (127) 34; (128) 35; (129) 37; (130) 39; (131) 41; (132) 42; (133) 43; (134) 45; (135) 46; (136) 49.
- Michigan** (19) 2; (20, 21) 4; (22) 7; (23, 24) 9; (25, 26) 12; (27, 28) 15; (29, 30, 31) 18; (32, 33) 20; (34) 22; (35, 36) 24; (37) 26; (40) 29; (38) 31; (41) 32; (39) 33; (42) 36; (43, 44) 38; (45) 40; (46, 47) 41; (48) 42; (49) 43; (50) 45; (51) 47.
- Minnesota** (15) 2; (16, 17, 18, 19) 10; (19, 20, 21) 13; (22) 21; (23) 23; (24) 31; (25) 33; (26, 37, 27) 34; (28) 41; (29) 43; (30) 44; (31) 47.
- Mississippi** (42) 2; (43) 5; (44, 45) 7; (46, 47, 48) 12; (49, 50) 19; (51, 52, 53) 24; (54) 28; (55) 30; (56) 31; (57) 34; (58) 38; (59) 42; (60) 45; (61) 48.
- Missouri** (46) 2; (47) 4; (48, 49) 8; (50, 51) 11; (52, 53, 54) 14; (55, 56, 57, 58) 17; (59, 60, 61, 62, 63) 21; (64, 65, 66) 27; (67) 29; (68) 30; (69) 33; (70) 35; (71) 36; (72) 37; (73) 39; (74) 41; (75) 42; (76) 43; (77) 46; (78) 47; (79) 49.
- Montana** (1, 2) 25; (3) 35; (4) 47.
- Nebraska** (3, 4) 19; (5) 25; (6, 7) 29; (8) 30; (9) 31; (10) 35; (11) 38; (12) 41; (13) 42; (14) 45; (15) 48; (16) 49.
- Nevada** (6) 8; (7) 8; (9) 16; (10, 11) 21; (12) 28; (13) 29; (14) 33; (15) 37; (16) 40; (17) 45.
- New Hampshire** (48) 2; (49) 6; (50) 9; (51) 12; (52) 13; (53) 16; (54, 55) 20; (56) 22; (57) 24; (58) 42; (59) 47; (60) 49.
- New Jersey** (34) 8; (35) 10; (36) 13; (37) 18; (38) 20; (39) 23; (40) 29; (41) 32; (42) 36; (43, 39; (44) 43; (45) 46.
- New Jersey Equity** (33) 36; (34) 38; (35) 40; (37) 45; (38) 48.
- New York** (41) 42; (43, 3; (44) 4; (45) 6; (46, 47) 7; (48) 8; (49, 50, 51) 10; (52) 11; (53, 54) 13; (55) 14; (56, 57) 15; (58, 59) 17; (60, 61, 19; (62, 63) 20; (64) 21; (65) 22; (66, 67, 68) 23; (69) 25; (70) 26; (71) 27; (72) 28; (73) 29; (74) 30; (75) 31; (76) 32; (77) 33; (78) 34; (79) 35; (80) 36; (81, 82) 37; (83, 84) 38; (85) 39; (86) 40; (87) 41; (88, 89) 42; (90, 91) 43; (92) 44; (93) 45; (94) 46; (95) 47; (96) 48; (97) 49.
- North Carolina** (65) 6; (66) 8; (67, 68, 69) 12; (70) 16; (71) 17; (72, 73, 74) 21; (75, 76) 22; (77, 78) 24; (79) 28; (80) 30; (81) 31; (82) 33; (83) 35; (84) 37; (85) 39; (86) 41; (87) 42; (88) 43; (89) 45; (90) 47; (91) 49.

SCHEDULE OF STATE REPORTS.

v

- Ohio (19) 2; (20) 5; (21) 8; (22) 10; (23) 13; (24) 15; (25) 18; (26) 20;
(27, 28) 22; (29) 23; (30, 31) 27; (32) 30; (33) 31; (34) 32; (35) 35;
(36) 38; (37) 41; (38) 43; (39, 40) 48.
- Oregon (3) 8; (4) 18; (5) 20; (6) 25; (7) 33; (8) 34; (9) 42; (10) 45.
- Pennsylvania (62) 1; (63, 64, 65) 3; (66, 67) 5; (68, 69) 8; (70, 71) 10;
(72, 73) 18; (74, 75) 15; (76, 77) 18; (78, 79, 80) 21; (81, 82) 22;
(83, 84) 24; (85, 86) 27; (87) 30; (88) 32; (89) 33; (90) 35; (91) 36;
(92) 37; (93, 94, 97) 39; (95) 40; (96, 98) 42; (99) 44; (100) 45; (101)
47; (102) 48; (103, 104) 49.
- Rhode Island (8) 5; (9) 11; (10) 14; (11) 23; (12) 34; (13) 43.
- South Carolina (1 N. S.) 7; (2, 3, 4) 16; (5) 22; (6, 7) 34; (8) 28; (9, 10) 30;
(11, 12) 32; (13) 36; (14) 37; (15) 40; (16) 42; (17) 43; (18) 44;
(19) 45; (20) 47.
- Texas (32) 5; (33, 34) 7; (35, 36, 37) 14; (38, 39, 40, 41, 42) 19; (43, 44,
45) 23; (46, 47, 48) 26; (49) 30; (50, 51) 32; (52) 36; (53) 37; (54)
38; (55) 40; (56) 42; (57, 58) 44; (59) 46; (60, 61) 48.
- Texas Ct. App. (1, 2) 28; (3, 4) 30; (5, 6, 7) 32; (8) 34; (9) 35; (10) 38;
(11) 40; (12) 41; (13) 44; (14) 46; (15, 16) 49.
- Vermont (42) 1; (43) 5; (44) 8; (45) 12; (46) 14; (47) 19; (48) 21; (49) 24;
(50) 28; (51) 31; (52) 34; (53) 38; (54) 41; (55) 45; (56) 48.
- Virginia (75) 40; (76) 44; (77) 46; (78) 49.
- Washington (1) 34.
- West Virginia (4) 6; (5) 13; (6) 20; (7, 8) 23; (9, 10, 11) 27; (12) 29;
(13) 31; (14) 35; (15) 36; (16) 37; (17, 18) 41; (19) 42; (20) 43;
(21) 45; (22) 46; (23) 48; (24) 49.
- Wisconsin (24) 1; (25) 3; (26) 7; (27, 28, 29) 9; (30, 31) 11; (32, 33) 14;
(34, 35, 36) 17; (37) 19; (38, 39) 20; (40, 41) 22; (42) 24; (43, 44) 28;
(45) 30; (46, 47) 32; (48) 33; (49) 35; (50) 36; (51) 37; (52) 38;
(53) 40; (54) 41; (55) 42; (56) 43; (57, 58) 46; (59) 48.

LIST OF JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

ALABAMA.

ROBERT C. BRICKELL, CHIEF JUSTICE.
GEORGE W. STONE,
H. M. SOMERVILLE.

CALIFORNIA.

R. F. MORRISON, CHIEF JUSTICE.
E. W. McKINSTRY,
S. B. McKEE,
E. M. ROSS,
J. D. THORNTON,
M. H. MYRICK,
J. R. SHARPSTEIN.

COLORADO.

WILLIAM E. BECK, CHIEF JUSTICE.
WILBUR F. STONE,
JOSEPH C. HELM.

INDIANA.

BYRON K. ELLIOTT, CHIEF JUSTICE.*
ALLEN ZOLLARS, CHIEF JUSTICE,†
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WILLIAM E. NIBLACK.
GEORGE V. HOWK.

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JAMES I. BEST,
JAMES B. BLACK,
WALPOLE G. COLERICK.

* At May term, 1884.

† At Nov. term, 1884.

LIST OF JUDGES.

vii

IOWA.

JAMES H. ROTHROCK, CHIEF JUSTICE.
JOSEPH M. BECK,
AUSTIN ADAMS,
WILLIAM H. SEEVERS,
JOSEPH R. REED.

KANSAS.

ALBERT H. HORTON, CHIEF JUSTICE.
DANIEL M. VALENTINE,
THEODORE A. HURD,*
WM. A. JOHNSTON.

MAINE.

JOHN A. PETERS, CHIEF JUSTICE.
CHARLES W. WALTON,
CHARLES DANFORTH,
WILLIAM WIRT VIRGIN,
ARTEMAS LIBBEY,
LUCILIUS A. EMERY,
ENOCH FOSTER,
THOMAS H. HASKELL.

MASSACHUSETTS.

MARCUS MORTON, CHIEF JUSTICE.
WALBRIDGE A. FIELD,
CHARLES DEVENS,
WILLIAM ALLEN,
CHARLES ALLEN,
WALDO COLBURN,
OLIVER W. HOLMES, JR.

MISSOURI.

WARWICK HOUGH, CHIEF JUSTICE.
JOHN W. HENRY,
ELIJAH H. NORTON,
ROBERT D. RAY,
THOMAS A. SHERWOOD.

* Appointed April 12, 1884.

LIST OF JUDGES.

NEBRASKA.

AMASA COBB, CHIEF JUSTICE.
SAMUEL MAXWELL,
M. B. REESE.

NEW HAMPSHIRE.

CHARLES DOE, CHIEF JUSTICE.
WILLIAM L. FOSTER, *
CLINTON W. STANLEY,
GEORGE A. BINGHAM,
WILLIAM H. H. ALLEN,
ISAAC W. SMITH,
LEWIS W. CLARK.
ISAAC N. BLODGETT. †

NEW YORK.

WILLIAM C. RUGER, CHIEF JUDGE.
CHARLES ANDREWS,
CHARLES A. RAPALLO,
THEODORE MILLER,
ROBERT EARL,
GEORGE F. DANFORTH,
FRANCIS M. FINCH.

NORTH CAROLINA.

WILLIAM N. H. SMITH, CHIEF JUSTICE.
THOMAS S. ASHE,
AUGUSTUS S. MERRIMON.

PENNSYLVANIA.

ULYSSES MERCUR, CHIEF JUSTICE.
ISAAC G. GORDON,
EDWARD M. PAXSON,
JOHN TRUNKEY,
JAMES P. STERRETT,
HENRY GREEN.
SILAS M. CLARK.

* Resigned October 1, 1880.

† Appointed November 30, 1880.

LIST OF JUDGES.

ix

TENNESSEE.

JAMES W. DEADERICK, CHIEF JUSTICE.
PETER TURNEY,
J. B. COOKE,
WILLIAM F. COOPER,
THOMAS J. FREEMAN.

TEXAS.

JOHN P. WHITE, PRESIDING JUDGE.
JAMES M. HURT,
SAMUEL A. WILLSON.

VIRGINIA.

LUNSFORD L. LEWIS, PRESIDENT.
BENJAMIN W. LACY,
THOMAS T. FAUNTLEROY,
ROBERT A. RICHARDSON
DRURY A. HINTON.

WEST VIRGINIA.

OKEY JOHNSON, PRESIDENT.
THOMAS C. GREEN,
ADAM C. SNYDER,
SAMUEL WOODS.

INDEX OF PAGES

AT WHICH THE DIFFERENT STATE REPORTS MAY BE FOUND.

	PAGE.
ALABAMA.....	48-77; 800-827
CALIFORNIA.....	78-112; 679-709
COLORADO..	839-876
INDIANA	152-187; 416-488; 781-799
IOWA.....	186-151
KANSAS.	484-507
MAINE.....	596-636
MASSACHUSETTS.....	1-42
MISSOURI.....	212-245
NEBRASKA.....	710-780
NEW HAMPSHIRE.....	802-838
NEW YORK.....	508-566
NORTH CAROLINA.....	687-654
PENNSYLVANIA	118-185; 567-595
TENNESSEE.....	655-678
TEXAS	188-211
VIRGINIA.....	377-415
WEST VIRGINIA.....	246-301

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Alabama, etc., R. Co. ada. Jordan.....	800	Clark's Adm'rs v. Richmond, etc., R.	
Allan's Executors ada. Montague.....	884	Co.....	804
Allen ada. Fellows.....	828	Coates ada. Dickinson.....	238
Allen ada. Thompson.....	116	Cole v. Superior Court.....	78
Alonzo v. State..	207	Coles v. Peck....	161
American Bible Society ada. Tilton....	321	Com. ada. Edwards.....	877
Ames ada. Huff.....	716	Com. v. Bringham.....	119
Applegate ada. Sodiker.....	252	Combs ada. Standard Oil Co.....	158
Atchison, etc., R. Co. v. Thul.....	484	Cook ada. Farrell.....	721
Atwater v. Sawyer.....	634	Corkill ada. Norris.....	480
Ayres v. Farmers & Merchants' Bank..	235	Cox ada. Rogers.....	153
		Cranfill ada. Balty.....	641
Balty v. Cranfill.....	641	Crary ada. Elkhart Co. Lodge.....	746
Baldwin v. Hartford Ins. Co.....	824	Crocker v. McGregor... ..	611
Ballou ada. Cutler.....	85	Crocker ada. Lenman.....	487
Bank of Newbury v. Sinclair.....	807	Cutler v. Ballou.....	85
Bank of Sonoma Co. v. Gove... ..	92		
Bare ada. Beaver.....	567	Dame ada. State.....	331
Barrows ada. State.....	629	Darling v. Wilson.....	806
Barstow v. Savage Mining Co.....	705	Davis ada. Sawyer.....	27
Baumgardner ada. Wiley.....	427	Desmond's Appeal... ..	118
Beaver v. Bare.....	567	Dickinson v. Coates.....	238
Birch v. Linton..	881	Dill, Matter of.....	506
Bishop v. Moorman.....	781	Dillenbeck v. Dygert.....	525
Bloom v. Franklin Life Ins. Co... ..	469	Drew ada. Pierce.....	7
Boston, City of ada. Peverly.....	87	Dunn ada. First National Bank of Os-	
Boston, etc., R. Co. ada. Carpenter... ..	540	wego.....	517
Brewster v. Warner.....	5	Dygert ada. Dillenbeck.....	525
Bricker ada. Richardson.....	344		
Bringham ada. Com.....	119	Eberlein ada. Wolfe.....	809
Bruce v. Reed.....	586	Edmondson ada. Seals.....	51
Bryce v. Joynt.....	94	Edmondson v. Wragg.....	590
Buck ada. Terre Haute, etc., R. Co....	168	Edwards v. Commonwealth.....	877
Burton ada. Lewis... ..	816	Edwards ada. Mansfield.....	1
		Edwards ada. Shealy.....	43
Campbell ada. Landis.....	239	Eggers v. Hink.....	98
Carpenter v. Boston, etc., R. Co.....	540	Elkhart Co. Lodge v. Crary.....	746
Carter v. Louisville, etc., R. Co.....	780	Ellison ada. Salisbury.....	347
Cartwright v. State.....	826	Elterson v. Leeds.....	458
Central Pacific R. Co. ada. San Fran-		Elting ada. Stroher..	515
cisco... ..	98	Enterprise Transit Company v. Sheedy.	130
Chase v. Second Avenue R. Co.....	581		
Chatard ada. O'Donovan.....	462	Farmers and Merchants' Bank ada.	
Chicago, etc., R. Co. v. Swanson.....	718	Ayres.....	235
City National Bank, etc., v. Phelps... ..	513	Farnum v. Patch.....	313
Clark v. Wilmington and Weldon R. Co.	647	Farrell v. Cook.....	721

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Fellows v. Allen.....	383	Keleher v. Putnam.....	304
Ferguson v. Hubbell.....	544	Kelly ada. State	620
Finlayson ada. Sioux City, etc., R. Co..	724	King ada. Nolan.....	561
Fickle v. Snapp.....	449	King ada. Stevens	609
First, etc., Baptist Church of Mason City ada. Sale.....	126	King v. Young	533
First National Bank of Oswego v. Dunn.	517	Knapp ada. Liebke	212
Fitchburg Railroad Co. ada. Snow ...	49	Kolb ada. Montgomery, etc., R. Co ...	54
Franklin Life Ins. Co. ada. Bloom.....	462		
Freeman ada. Hill.....	48	Laconia ada. Sleeper.....	311
Frew ada. State	257	Lamphear ada. Hummer	491
		Landis v. Campbell.	299
Gardner ada. City of Valparaiso	416	Lanman v. Crocker	437
Gardner ada. State	680	Lawrence ada. Reis	63
Garvey's Case	353	Learned v. Tillotson.....	533
Gay v. Seibold... ..	533	Leeds ada. Elterson.....	433
Geers ada. Reichert	733	Legrand ada. People's Bank of Wilkes- barre	123
Getchell ada. Sanders.....	603	Leverich ada. Pringle	539
Gilbert v. Moose.	570	Lewis v. Burton.....	513
Goodale v. Mooney.....	334	Liebke v. Knapp	212
Gordon v. Tweedy	513	Linton ada. Birch.....	351
Gove ada. Bank of Sonoma Co.....	93	Louisville, etc., R. Co. ada. Carter	730
Grant ada. State.....	213	Louisville, etc., R. Co. v. MoVay.....	770
Green ada. People.....	351	Lovell ada. Hicks	679
Griffin ada. Hedden.....	25	Lucas ada. Hornbrooks.....	277
Guardian Fire and Life Ins. Co. ada. Powers.	20		
		Maine Central R. Co. ada. State. ...	622
Hale ada. Northrop	615	Mann ada. Mann.....	543
Hall v. State.	324	Mansfield v. Edwards	1
Hardeman v. State.....	321	Markham ada. People	700
Hardy ada. City of South Bend	702	Marks, Matter of	634
Harness ada. Norwood.....	739	McCord v. Oakland Quicksilver Mining Co	609
Hart ada. Haughey	123	McElevey ada. Sankey	575
Hart v. State	133	McGregor ada. Crocker	611
Hartford v. State.....	135	McMurray ada. Terre Haute, etc., R. Co.	739
Hartford Ins. Co. ada. Baldwin.....	394	McQueen's Appeal.. ..	592
Hartman ada. Weber.....	399	MoVay ada. Louisville, etc., R. Co.....	770
Haughey v. Hart.....	123	Metz ada. Moreland.....	243
Hedden v. Griffin	25	Meyer v. Phillips	523
Hibbits v. Jack.....	473	Mohr, Matter of	63
Hicks v. Lovell.....	679	Montague v. Allan's Executors.....	354
Hill v. Freeman.....	43	Montgomery, etc., R. Co. v. Kolb.....	54
Hink ada. Eggers... ..	93	Moon's Adm'r v. Richmond and Alle- ghany R. Co ...	401
Hobbs ada. Murphy.....	339	Mooney ada. Goodale... ..	334
Hornbrooks v. Lucas	277	Mooney ada. Unger ,	109
Hubbell ada. Ferguson.....	544	Moorman ada. Bishop.....	731
Huff v. Ames	716	Moose ada. Gilbert	570
Hulings ada. Johnson.....	121	Moreland v. Metz	243
Hummer v. Lamphear	491	Muldoon v. Rickey.....	117
Hunt ada. Whitesides	441	Murphy v. Hobbs.....	333
Jack ada. Hibbits	473	Nashville, etc., R. Co. ada. Jackson ...	633
Jackson v. Nashville, etc., R. Co.....	633	Nashville, etc., R. Co. ada. Parks.....	655
James ada. Odd Fellows Mut. Aid, etc.	107	National Life Ins. Co. ada. Smith.....	121
Johnson v. Hulings.....	121	Nixon ada. Rice	430
Jones ada. Smith	593	Nolan v. King	561
Jordan v. Alabama, etc., R. Co.....	300		
Joynt ada. Bryce.	94		

TABLE OF CASES REPORTED.

xiii

	PAGE.		PAGE.
Norris v. Corkill	459	Sawyer v. Davis	27
North Carolina State Life Ins. Co. v. Williams... ..	657	Schultz v. State	194
Northrop v. Hale	615	Seals v. Edmundson.....	51
Norwood v. Harness	739	Second Avenue R. Co. ads. Chase.....	581
Oakland, etc., Mining Co. ads. McCord.	696	Seibold ads. Gay	583
Odd Fellows' Mut. Aid, etc., v. James..	107	Shealy v. Edwards	48
O'Donovan v. Chatard.....	492	Sheedy ads. Enterprise Transit Co. ..	120
Packard ads. Strout	601	Shields ads. Quinn.....	141
Parks v. Nashville, etc., R. Co.....	655	Shoemaker ads. State	148
Partlow ads. State	658	Simmons ads. Smith	113
Patch ads. Farnum	313	Sinclair ads. Bank of Newbury	307
Payne v. Western and Atlantic R. Co..	646	Sioux City, etc., R. Co. v. Finlayson . .	734
Peck ads. Coles.....	161	Sleeper v. Laconia	311
Pennsylvania Co. ads. Stoner.....	764	Smith v. Jones	333
People v. Green	351	Smith v. National Life Ins. Co	121
People v. Mann	556	Smith v. Simmons	113
People v. Markham	700	Snepp ads. Finkle... ..	449
People's Bank of Wilkesbarre v. Le- grand	126	Snow v. Fitchburg Railroad Co ..	40
Perkins ads. Snow	333	Snow v. Perkins.....	333
Peters ads. Tabor.....	304	Sodiker v. Applegate	232
Peverly v. City of Boston	37	South Bend, City of, v. Hardy..	733
Phelps ads. City National Bank of Poughkeepsie	513	South, etc., R. Co. v. Wood.....	319
Phillips ads. Myer.....	523	Standard Oil Co. v. Combs	156
Pierce v. Drew	7	State ads. Alonzo	207
Pittsburgh, etc., R. Co. v. Taylor.....	530	State v. Barrows.. ..	620
Powell, Matter of	71	State ads. Cartwright	326
Powers v. Guardian, etc., Ins. Co..	20	State v. Dame	331
Pringle v. Leverich	523	State v. Frew	257
Putnam ads. Keleher	304	State v. Gardner	600
Quinn v. Shields	141	State v. Grant	218
Railroad Company ads. State	200	State ads. Hall	324
Reed ads. Bruce.....	566	State ads. Hardeman	321
Reichert v. Geers	736	State ads. Hart	183
Reis v. Lawrence	83	State ads. Hartford	185
Reuber ads. Waters	710	State v. Kelly	620
Rice v. Nixon.....	430	State v. Maine Cent. R. Co.....	622
Richardson v. Bricker	344	State v. Partlow	653
Richmond, etc., R. Co. ads. Clarke's Adm'r	304	State v. Railroad Company	200
Richmond, etc., R. Co. ads. Moon's Adm'r	401	State ads. Schultz.....	194
Rickey ads. Muldoon	117	State v. Shoemaker	146
Rogers v. Cox	153	State ads. Temple.. ..	200
Sabin ads. Yerkes.....	424	State ads. Warwick.. ..	59
Salsbury v. Ellison	347	Stender ads. White	233
Sale v. First, etc., Baptist Church.....	136	Stetson ads. Thomas.....	143
Sanders v. Getchell	606	Stevens v. King	609
Sankey v. McElevey.....	575	Stoner v. Pennsylvania Co.....	764
San Francisco v. Central, etc., R. Co...	96	Stroher v. Elting.....	515
Sawyer ads. Atwater	634	Strout v. Packard	601
		Sugg ads. Wood	609
		Superior Court ads. Cole.....	73
		Swanson ads. Chicago, etc., R. Co.....	713
		Tabor v. Peters	304
		Taylor ads. Pittsburgh, etc., R. Co	530
		Temple v. State	200
		Terre Haute, etc., R. Co. v. Buck.....	163
		Terre Haute, etc., R. Co. v. McMurray.	733
		Thomas v. Stetson	143

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Thompson v. Allen	116	Whitaker v. Warren	308
Thul ads. Atchison, etc., R. Co	484	White v. Stender	283
Tilton v. Amer. Bible Society	281	Whitesides v. Hunt	441
Tillotson ads. Learned	508	Wiley v. Baumgardner	437
Towle v. Wood	287	Williams ads. North Car. State Life Ins. Co	687
Tweedy ads. Gordon	282	Wilmington & Weldon R. Co. ads. Clark	647
Unger v. Mooney	122	Wilson ads. Darling	385
Valparaiso, city of, v. Gardner	428	Wells v. Eberlein	589
Warner ads. Brewster	5	Wood ads. Smith, etc., R. Co	319
Warren ads. Whitaker	508	Wood v. Sugg	680
Warwick v. State	59	Wood ads. Towle	288
Waters v. Reuber	710	Wragg ads. Edmundson	589
Weber v. Hartman	380		
Western Atlantic R. Co. ads. Payne	508	Yorke v. Sahn	484
		Young ads. King	585

TABLE OF CASES CITED.

	PAGE.
Abott v. Abbott, 51 Me. 575	439, 440
Abbott v. Edgerton, 53 Ind. 196	782
Abbott v. Pearson, 130 Mass. 191	95
Abel v. Alexander, 45 Ind. 525; 15 Am. Rep. 270	778
Abel v. Love, 17 Cal. 233	696, 699
Abell v. Harris, 11 Gil. & J. 371	103
Abernathie v. Con. Virginia Mining Co., 18 Nev. 290	105
Abington v. Duxbury, 105 Mass. 287	616
Abshire v. Mather, 27 Ind. 881	778
Acker v. White, 25 Wend. 614	519
Adams v. Adams, 13 Pick. 384	342
Adams v. Claxton, 6 Ves. 236	743
Adams v. Insurance Company, 1 Rawle, 97	571
Adams v. O'Connor, 100 Mass. 515, 518; s. c., 1 Am. Rep. 137	6
Adams v. Turrentine, 8 Ired. 147	653
Adler v. State, 55 Ala. 16	204
Adrianse v. Roope, 52 Barb. 309	772
Ætna Bank v. Fourth National Bank, 46 N. Y. 82; s. c. 7 Am. Rep. 314	231
A. T. & S. F. R. Co. v. Thal, 29 Kana. 465	436
Ala. Gold Life Ins. Co. v. Cobb, 57 Ala. 547	202
Aldrich v. Aldrich, 8 Metc. 108	601
Alexander v. Alexander, 61 Ind. 541	505
Alexander v. Chamberlain, 1 Thomp. & Cook, 600	616
Alexander v. Kennedy, 19 Tex. 496	105
Allen v. Ferguson, 18 Ala. 1	810
Allen v. Hart, 72 Ill. 104	807
Alger v. Miss. & Missouri Ry. Co., 10 Iowa, 208	140
Allen v. Maddock, 11 Moore P. C. C. 426	455
Allen v. Massachusetts Ins. Co., 99 Mass. 160	22
Allen v. Maury, 66 Ala. 10; Chit. Contr. 200	44, 46
Allen v. Mills, 17 Wend. 202	579
Allen v. Peters, 4 Phila. 78	510
Allen v. Scharringhausen, 8 Mo. App. 229	207
Allen v. Shannon, 74 Ind. 164	439
Am. Fur. Co. v. United States, 2 Pet. 365	605
American Ins. Co. v. Oakley, 9 Pal. 496; 23 Am. Dec. 561	
American Tract Society v. De Witt, 9 Allen, 447, 451	233
Am. Tract Society v. Atwater, 30 Ohio St. 77	144
Ames v. Hoy, 12 Cal. 11	494
Ames Iron Works v. Warren, 76 Ind. 512; s. c., 40 Am. Rep. 253	159
Anderson v. Jacobson, 66 Ill. 523	89
Andrews v. Knox Co., 70 Ill. 65	201
Angie v. Speer, 66 Ind. 488	439
Anon, 31 Me. 502	63
Anthoine v. Coit, 2 Hall, 40	512
Anthony v. Stinson, 4 Kana. 231	487
Apgar v. Hiller, 4 Zab. 613	8

	PAGE.
Appeal of the City of Erie, 91 Penn. St. 303	424
Armitage v. Baldwin, 5 Beav. 273	527
Armstrong v. Toler, 11 Wheat. 268	124
Arnold v. Comm., 80 Ky. 390; s. c., 44 Am. Rep. 480	239
Arnold v. Middletown, 39 Conn. 406	233
Arnot v. Alexander, 44 Mo. 25	162
Arrington v. Larrabee, 10 Cush. 512	156
Arnstein v. Gardner, 134 Mass. 4	534
Ashburner v. Parrish, 81 Penn. St. 52	743
Ashby v. West, 8 Ind. 170	438
Ashton v. Dakin, 5 N. & N. 867	445
Atcheson, etc., R. Co. v. Blackshire, 10 Kana. 477	206
Atchison, etc., R. Co. v. Reecher, 24 Kana. 228	757, 775, 778
Atlantic and Pacific Telegraph v. Chicago, Rock Island & Pacific Railroad, 6 Biss. 158	13
Atlantic, etc., R. Co. v. Reiser, 18 Kana. 458	757, 762, 775
Attorney-General v. Haberdashers' Co., 1 Myl. & K. 420	336
Attorney-General v. Life Ins. Co., 71 N. Y. 325; s. c., 27 Am. Rep. 55	231
Attorney-General v. Metropolitan Railroad, 125 Mass. 515, 517; s. c., 23 Am. Rep. 264	12, 13, 14
Auburn & Cato R. Co. v. Douglass, 9 N. Y. 447	676
Ayerst v. Jenkins, L. R., 16 Eq. 275; s. c., 6 Moak Eng. 756	51
Backus' Appeal, 58 Penn. St. 136	163
Baile v. Ins. Co., 73 Mo. 371	214, 216
Bailey v. Kalamazoo Pub. Co., 40 Mich. 251	204
Baily v. Merrell, 3 Bulst. 95	308
Bains v. Williams, 3 Ired. 481	579
Baker v. Rinehard, 11 W. Va. 238	285
Baker v. Whiting, 3 Sumn. 485	696
Baltimore & Potomac Railroad v. Fifth Baptist Church, 108 U. S. 317	30
Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74; 48 Am. Rep. 124	163
Baltimore, etc., R. Co. v. Raney, 42 Md. 117	173, 183
Baltimore, etc., v. Sherman, 26 Gratt. 602	203
Baltimore and Ohio Railroad Co. v. Stricker, 51 Md. 47; s. c., 34 Am. Rep. 294	399
Bamford v. Barton, 2 Moody & Ryan, 23. 613	
Bancroft v. Cambridge, 123 Mass. 438, 441	23, 29, 30
Bank v. Bank, 30 Ill. 212; s. c., 23 Am. Rep. 185	234
Bank v. Good, 21 W. Va. 455	272
Bank v. Schulz, 3 Ohio, 471	735
Bank v. Whitman, 94 U. S. 343	230
Bankers' Appeal, Penn. Supreme Ct. Oct., 1884	454

	PAGE.		PAGE.
Bank of Republic v. Millard	300	Bliss v. North Car. Home Ins. Co. , 80	
Banks v. Barnett , 12 W. Va. 773.....	379	N. C. 141.....	26
Barbee v. Reese , 80 Miss. 906.....	173	Bigler v. Thickinger , 55 Penn. St. 375..	317
Barden v. Boston, Clinton & Fitchburg			308
Railroad, 121 Mass. 420.....	20	Billman v. Indianapolis, etc., R. Co. ,	
Barfield v. State , 14 Ala. 603.....	703, 704	76 Ind. 166, 8 C., 40 Am. Rep. 250. 173.	473
Barlow v. Lambert , 26 Am. 704.....	34		476
Barnaby v. Wood , 50 Ind. 405.....	175	Bill v. City of Ottumwa , 35 Iowa, 109	361
Barnard v. Beckhaus , 32 Wis. 300.....	443	Binford v. Johnston , 23 Ind. 429; 8 C.,	
Barnes v. Ins. Co. , 51 Me. 110.....	334	42 Am. Rep. 508.....	176, 473
Barney v. Saunders , 16 How. 535.....	745	Blackford v. Preston , 8 T. R. 89.....	746
Barrett v. People , 54 Ill. 325.....	304	Black v. Oliver , 1 Ala. 440.....	30
Barrett v. Stanton , 2 Ala. 181.....	306	Blackburn v. Crawford , 3 Wall 175.....	616
Barnum v. Barnum , 42 Md. 251, 304.....	618	Black Hawk County v. Cotter , 23 Iowa,	
Barr v. Gratz , 4 Wheat. 213, 223.....	705	125.....	167
Barr v. Moore , 3 Morris, 335.....	569	Blackwell v. State , 67 Ga. 76, 8 C., 44	
Barrett v. Lightfoot , 1 Mon. 341.....	343	Am. Rep. 717.....	182
Barry v. Butlin , 1 Curtis, 8 Reg. Rec. 417	304	Blair v. Erie R. Co. , 64 N. Y. 315; 8 C.,	
	417	28 Am. Rep. 54.....	541
Barry v. Ransom , 12 N. Y. 442, 445.....	4	Blane v. Rodgers , 40 Cal. 14.....	594
Bart v. Commonwealth , 2 P. & W. 253	114	Blanchard v. Baker , 5 Me. 233.....	399
Bartlett v. Remington , 59 N. H. 364, 365	327	Bleeker v. Hyde , 3 McLean, 570.....	398
Bartlett v. Smith , 13 Fed. Rep. 263.....	445	Blight's Lessee v. Rochester , 7 Wheat.	
Barton v. Dickens , 48 Penn. St. 518.....	373	325.....	182
Bartonshill Coal Co. v. Reid , and the		Bliss v. Harshbarger , 31 Gratt. 316.....	306
same company v. McGuire, 3 Mass. 356, and 300 H. L. Cases.....	409	Bliss v. McDuffie , 4 Bush, 131.....	623
Batchelder v. Moore , 43 Cal. 413.....	301	Board of Trade Telegraph v. Barnett ,	
Batson v. King , 4 H. & N. 739.....	3	107 Ill. 507, 8 C., 47 Am. Rep. 428.....	13
Batstone v. Batten , L. R., 10 Ch. App. 431, 14 Moak Eng. Rep. 714.....	336	Board, etc., v. May , 67 Ind. 545.....	719
Baylor v. Del. & W. R. Co. , 11 Vroom, 21, 8 C., 29 Am. Rep. 308.....	300	Board, etc., v. Slater , 62 Ind. 171.....	726
Bay State Brick Co. v. Foster , 115 Mass. 431.....	3	Bogardus v. Trinity Church , 4 Paige, 178	726
Baxley v. Linah , 18 Penn. St. 341.....	304	Bohall v. Diller , 41 Cal. 522.....	661
Baxter v. Roberts , 44 Cal. 187, 8 C., 30	406	Bolling v. Lerner , 26 Gratt. 36.....	306
Am. Rep. 160.....	304	Bond v. Seawall , 3 Burr. 1773.....	423
Beale v. Bank , 5 Watts, 569.....	30	Bonnell v. Allen , 3 Ind. 130.....	734
Bean v. Morgan , 4 McCord, 143.....	408	Bonn v. Steamboat Belfast , 40 Ala. 154	64
Beard v. Dennis , 6 Ind. 200.....	196	Boston v. Richardson , 13 Allen, 146, 308	11
Beardall v. State , 9 Tex. Ct. App. 282.....	228		30
Beatty v. Knowles , 4 Pet. 158.....	182	Boston & Sandwich Glass Co. v. Moore ,	
Beauchamp v. Haginaw, etc., Co. , 30	144	119 Mass. 435.....	36
Mich. 163, 8 C., 45 Am. Rep. 30.....	300	Boston v. State , 32 Am. Rep. 575.....	366
Beaver v. Pilson , 8 Penn. St. 267.....	144	Bowell v. Green , 1 Dutch 300.....	46
Beaver v. Taylor , 1 Wall. 637.....	300	Bouldin v. Alexander , 15 Wall. 131.....	406
Bedinger v. Wharton , 27 Gratt. 679.....	303	Bowden v. State , 3 Tex. Ct. App. 59.....	306
Bees v. Dudley , 26 N. H. 249.....	311	Bowen v. Clark , 46 Ind. 405.....	724
Beekman v. Hudson , 20 Wend. 63.....	483	Bowie v. Kansas City , 61 Mo. 464.....	306
Beene v. State , 22 Ark. 151.....	356	Boyce v. Anderson , 2 Leigh, 580.....	304
Behn v. State , 53 Ala. 108.....	302	Boyd v. Barclay , 1 Ala. 84.....	30
Behler v. Parsons , Amb. 319.....	743	Bradford v. Cressy , 45 Me. 9.....	306
Bell v. Morrison , 1 Pet. 35.....	512	Bradford v. Spyker , 32 Ala. 134.....	313
Bell v. Sawyer , 32 N. H. 73.....	440	Bradford v. State , 54 Ala. 230.....	307
Bellefontaine, etc., R. Co. v. Snyder , 10	717	Bradley v. Fisher , 13 Wall. 335.....	306
Ohio St. 349.....	310	Bradley v. Heath , 12 Pick. 383.....	304
Bellows v. Lovell , 5 Pick. 307, 311.....	302	Bradley v. Mutual Insurance Co. , 46 N.	
Belmont v. Morrill , 60 Me. 314.....	308	Y. 422, 8 Am. Rep. 115.....	473, 676
Benadum v. Pratt , 1 Ohio St. 408.....	38	Bradley v. Rice , 12 Me. 126, 29 Am. Dec.	
Benedict v. City of Fond du Lac , 48	354	301.....	626
Wis. 406.....	726	Bradstreet v. Huntington , 5 Pet. 409.....	306
Bennett v. McFadden , 61 Ill. 304.....	702	Brady v. Page , 59 Cal. 201.....	306
Bennett v. N. J., etc., Co. , 26 N. J. L. 305; 13 Am. Rep. 405.....	30	Brady v. Weeks , 8 Barb. 157.....	306
Bennett v. North British, etc., Ins. Co. ,		Branch v. Holcraft , 14 Ind. 227.....	406
8 Duly, 671.....	30	Branch Bank v. Boykin , 9 Ala. 300.....	301
Benson v. Hartshorn , 1 Meta. 24.....	30	Brand v. Hammersmith and City Rail-	
Benton v. Chicago, etc., R. Co. , 55 Iowa, 406	736	way, L. R., 1 Q. B. 120; 254 255; 4 R.	
Berkley Fire Insurance Co. , 4 Camp. 431.....	613	L. 171.....	30
Berk v. State , 13 Ind. 684.....	703, 707	Brant v. Phlen , 59 Md. 1.....	316
Berthold v. Goldsmith , 24 How. 542.....	305	Brazzell v. Laconia M. Co. , 48 Me. 113.....	307
Beveridge v. Hewit , 3 Brad. 497.....	445	Brewster v. Mott , 4 Scam. 373.....	306
Biddle v. Ramsey , 25 Me. 123.....	306	Bricker v. Lightner's Executors , 40 Penn.	
Biddle v. Rogers , 16 Allen, 403.....	306	St. 129.....	376
Bignow v. Benedict , 79 N. Y. 223; 26	446	Bright v. State , 46 Am. Rep. 631.....	304
Am. Rep. 373.....	446	Briggs v. Parsons , 30 Mich. 600.....	306
		Brian v. Boyd , 4 Paige, 17.....	306
		Broad Street Hotel Co. v. Weaver , 27	
		Ala. 28.....	306
		Brecht v. Brock , 10 Wall. 519.....	616
		Broneau v. Wiman , 10 Barb. 613; 26	
		Armed & N. Y. 123.....	306

TABLE OF CASES CITED.

xvii

PAGE.	PAGE.
Brooklyn Gravel Road Co. v. Slaughter, 11 Ind. 185..... 773	Caperton v. Gregory, 11 Gratt. 805..... 105
Brothers v. Corbitt, 22 Mo. 378; s. c., 14 Am. Rep. 434..... 404	Carr v. Hope, 3 B. & C. 691..... 740
Brown's Appeal, 22 Penn. St. 284..... 289	Carless v. Carless, 10 Ves. 601, 623... 280
Brown v. Bartlett, 22 N. H. 511..... 287	Carey's Estate, 46 Vt. 260..... 280
Brown v. Chicago, etc., Ry. Co., 34 Wis. 248; s. c., 41 Am. Rep. 41..... 173, 179	Carr v. Deleander, 12 Mo. 280..... 310
Brown v. Clark, 71 N. Y. 200..... 200	Cartelle v. United States, 16 Wall. 167..... 370
Brown v. Commonwealth, 2 Grant. 308..... 120	Cartelle v. Wallace, 12 Ind. 208..... 400
Brown v. Houston, 22 La. Ans. 243; s. c., 22 Am. Rep. 244..... 108, 161	Carper v. King, v. Metz, 511, 48 Am. Dec. 405..... 3
Brown v. Kelley, 2 Oush. 243..... 144	Carr v. National Security Bank, 27 Mass. 45; s. c., 9 Am. Rep. 9..... 280
Brown v. Maryland, 12 Wheat. 419..... 161	Cartier v. Baker, 1 Savy 515..... 407
Brown v. Milwaukee, etc., R. Co., supra..... 175	Cartier v. Howe Machine Co., 51 Md. 250, 34 Am. Rep. 111..... 100
Brown v. Missouri, etc., Ry. Co., 67 Mo. 120..... 700	Cartwright v. case, 114 Mass. 229..... 200
Brown v. Piper, 91 U. S. 37..... 301, 305	Cartwright v. Briggs, 41 Ind. 184..... 710
Brown v. Hall, 6 La. 177..... 444	Case of Daniel Hall, 10 Wall. 557..... 200
Brown v. Swinford, 44 Wis. 282..... 287, 288	Case v. Mayor of Mobile, 20 Ala. 508... 210
Brownell v. Brownell, 10 Wend. 287..... 600	Cassand v. Hihman, 1 How. 237..... 445
Brun's Appeal, 51 Penn. St. 284..... 444	Cassidy v. Angell, 12 R. I. 447, 34 Am. Rep. 280..... 600
Brunet v. Crandall, 22 Mo. 410..... 204	Causey v. Pittsburgh, etc., Ry. Co., 22 Penn. St. 400..... 700
Bruno v. City of Buffalo, 20 N. Y. 673..... 200	Case v. Bank v. Farmers' Bank, 22 Md. 141..... 200
Bryan v. Lewis, Ry. & Moody, 289..... 444	Chadwick v. Collins, 20 Penn. St. 150..... 111
Bryan v. Reynolds, 2 Wis. 240..... 700	Chalmers v. Harding, 17 L. T. (N. S.) 571..... 200
Bryant v. Western Union Tel. Co., 17 Fed. Rep. 225..... 445	Chamberlain v. Pratt, 22 N. Y. 47..... 200
Buchanan v. Lagasport, etc., Ry. Co., 71 Ind. 245..... 115	Chamberlain v. Sterns, 111 Mass. 207... 200
Buckner v. Sayre, 13 R. Mour. 745..... 200	Chambers v. McDaniel, 6 Fed. 225..... 200
Bull v. State, 71 Ind. 220..... 770	Chapin v. Marvin, 12 Wend. 200..... 200
Bullard v. Randall, 1 Gray, 605..... 200	Chapline v. Conant, 3 W. Va. 207..... 200
Bullock v. Griffin, 1 Strobb. Eq. 60..... 60	Chapman v. Campbell, 12 Gratt. 105..... 445
Burbank v. Bethel Steam Mill Co., 73 Mo. 373; s. c., 40 Am. Rep. 400..... 413	Chapman v. Colley, 47 Mich. 44..... 200
Burke v. Bekhart, 1 Den. 241..... 250	Chapman v. White, 6 N. Y. 418..... 201, 202
Burk v. State, 27 Ind. 430..... 470	Chapman v. Wilber, 6 Hill. 415..... 201
Burke v. Mittenberger, 10 Wall. 510... 200	Chase v. Cheney, 25 Ill. 200; s. c., 11 Am. Rep. 25..... 404, 405, 407
Burke v. Lase, 1 N. Y. 120..... 200	Chase v. Fish, 12 Mo. 122..... 601
Burlington Water Co. v. Woodward, 40 Iowa, 12..... 404	Chase v. Sutton Manuf. Co., 4 Oush. 122, 127..... 11
Burns v. Simpson, 9 Kans. 405, 404, 405..... 405	Chase v. Wingate, 22 Mo. 204; s. c., 22 Am. Rep. 25..... 200
Burnett v. Buena Vista Co., 48 Ala. 11; s. c., 7 Am. Rep. 224..... 22, 23	Chastard v. O'Donovan, 20 Ind. 20; s. c., 41 Am. Rep. 720..... 400
Burt v. Pines, 6 Cow. 431..... 60	Chester v. Dickinson, 24 N. Y. 1..... 200
Bush v. Foote, 22 Miss. 5; s. c., 20 Am. Rep. 210..... 200	Chicago and N. W. R. Co. v. Jackson, 22 Ill. 222; s. c., 9 Am. Rep. 604..... 400
Bushnell v. Church, 20 Conn. 400..... 210	Chicago, etc., R. Co., v. Kleber, 9 Bradw. (Ill.) 615..... 200
Bushnell v. Com. Ins. Co., 13 S. & R. 170..... 201	Chicago R. v. Pondron, 22 Ill. 200; s. c., 9 Am. Rep. 224..... 200
Buying v. Insurance Co., 24 Ohio 22..... 100	Chicago, etc., Ry. Co. v. Ives, 120 U. S. 577..... 700
Butcher v. Bank of Brownsville, 2 Kane 70; s. c., Am. Lead. Cas. 412, et seq. 204	Chickster v. Canal, Dutch Co., 20 Cal. 225, 226..... 112
Butterfield v. Forrester, 11 East. 60, 62, 100..... 200	Child v. City of Boston, 6 Allen, 41... 200
Butterton v. Hoops, 3 Lea, 215; s. c., 11 Am. Rep. 400..... 200	Choate v. State, 21 Ga. 400, 401..... 200
Bryne v. Wilson, 15 Irish C. L. 222..... 174	Christen v. Grierson, 2 Bligh (N. H.) 404; s. c., 3 Wils. & H. 222..... 200
C. P. R. Co. v. Mudd, 25 Cal. 224..... 200	Christie v. Griggs, 2 Campb. 72..... 170
Cadiz v. Majors, 20 Cal. 220..... 200	Christmas v. Russell, 14 Wall. 60..... 200
Cain v. Purlow, 47 Ga. 674..... 100	Christy v. Ogil's Ex'r, 22 Ill. 225..... 200
Cairo, etc., R. Co. v. Mahoney, 22 Ill. 787, 775, 779..... 779, 775, 779	Churchill v. Mahon, 1 P. Wms. 241... 700
Caldwell v. Scott, 54 N. H. 414..... 150	Cincinnati, etc., R. Co. v. Bates, 24 Ind. 674..... 600
Call v. Allen, 1 Allen 127..... 20	Cincinnati, etc., R. Co. v. Peters, 20 Ind. 125..... 214
Callender v. Marsh, 1 Pick. 415, 420..... 13, 16	City of Anderson v. O'Connor, 22 Ind. 120..... 700
Cameron v. Stockman, 39 Mich. 120..... 204	City of Ashburn v. Challa, 9 Kans. 600..... 200
Cameron v. Dunkhelm, 53 N. Y. 425..... 445	City of Central v. Kroups, 24 Ill. 12..... 200
Cameron v. State, 14 Ind. 450..... 770	City of Chicago v. Gallagher, 44 Ill. 205..... 201
Carmack v. Lewis, 15 Wall. 463..... 373, 374	City of Chicago v. Langdon, 22 Ill. 221; s. c., 4 Am. Rep. 602..... 201
Campbell v. Briggs, 48 Penn. St. 524, 579..... 204, 207	City of Cranfordville v. Smith, 70 Ind. 220; s. c., 41 Am. Rep. 615..... 700
Campbell v. Meier, 4 Johns. Ch. 224..... 207	
Campbell v. Seaman, 63 N. Y. 225; s. c., 20 Am. Rep. 507..... 200	
Campbell v. State, 48 Ala. 20..... 100	
Cassidy v. Phoenix Ins. Co. 20 Mo. 225..... 200	

	Page.		Page.
City of Delphi v. Bowen, 81 Ind. 22.....	222	Coffin v. City Council, 28 Iowa, 222.....	222
City of Detroit v. Beckman, 24 Mich. 125; s. c., 22 Am. Rep. 207.....	200	Cocker v. Hays, 9 Ga. 425	122
City of Hopkins v. Kansas, etc., R. Co., 70 Mo. 85	232, 233	Colburn v. Mason, 25 Me. 424	207
City of Indianapolis v. Gaston, 45 Ind. 224	179	Colby v. Jackson, 12 N. H. 202	202
City of Indianapolis v. Indianapolis, etc., Co., 45 Ind. 224.....	418	Colcord v. Swan, 7 Mass. 291	27
City of Lafayette v. James, 22 Ind. 240; 47 Am. Rep. 120.....	729	Cole v. Lake Co. 34 N. H. 242	207
City of Lansing v. Toolan, 27 Mich. 125.....	222	Cole v. Milmine, 28 Ill. 249	245
City of Madison v. Smith, 22 Ind. 222.....	417	Queman v. Lewis, 27 Penn. St. 201.....	122
City of Navasota v. Pearce, 44 Tex. 222; s. c., 22 Am. Rep. 279	222	Collamer v. Day, 2 Vt. 144	222
City of New Orleans v. Rollins, etc., Co., 22 La. Ann. 227; s. c., 22 Am. Rep. 279	222	Collins v. Early, 54 Ind. 260	172
City of New Orleans v. Labatt, 22 La. Ann. 107	222	Collingwood v. Irwin, 3 Watts. 222.....	222
City of New York v. Mill, 11 Fed. 222.....	222	Collins v. Blanton, 1 Smith Lead. Cas. 121, and English Notes	40
City of Philadelphia v. Gilmer, 71 Penn. St. 140	122	Collins v. State, 25 Tex. Supp. 222.....	222
City of Solomon v. Hughes, 24 Kans. 211	222	Coke v. Weeks, 7 Hill, 45	227
City of Topeka v. Gillett, 22 Kans. 421.....	201	Colquitt v. Stultz, 45 Ga. 222.....	222
City of Vincennes v. Callender, 22 Ind. 421.....	417	Columbus, etc., Ry. Co. v. Arnold, 22 Ind. 124	729
City of Washington v. Small, 22 Ind. 422 See page 422.....	179	Columbus, etc., Ry. Co. v. Farrell, 22 Ind. 422.....	222
Claffin v. Hirsch, Gen. T. Sup. Ct. First Dept. March, 1894, 19 Week. Dig. 242.....	222	Columbus, etc., Ry. Co. v. Powell, 40 Ind. 27	222
Clapp v. Bromagham, 9 Cow. 221, 222, 223.....	103	Commonwealth v. Allen, 125 Mass. 42; s. c., 22 Am. Rep. 222.....	222
Clapp v. Rice, 12 Gray, 422.....	2	Commonwealth v. Andrews, 27 Mass. 222.....	22
Clark v. Allen, 11 N. L. 422; s. c., 22 Am. Rep. 422.....	272	Commonwealth v. Boston, 27 Mass. 222.....	2
Clark v. City of Rochester, 24 Barb. 422.....	422	Commonwealth v. Brown, 120 Mass. 279.....	222
Clark v. Colbert, 27 Ala. 22	42	Commonwealth v. Perkins, etc., reported in 4 Leigh	272
Clark v. Foss, 1 Biss. 240.....	442	Commonwealth v. Essex Co., 12 Gray, 222, 247.....	22
Clark v. Holmes, 1 Hurst & Nor. 227.....	422	Commonwealth v. Halfway, 42 Penn. St. 442.....	222
Clark v. Ins. Co., 2 Cusk. 222; 22 Am. Dec. 44	222	Commonwealth v. Halfway, 44 Penn. St. 210.....	77
Clark v. Jeffersonville, etc., R. Co., 44 Ind. 222, 242.....	724	Commonwealth v. Harney, 22 Moto. 422.....	222
Clark v. Lockwood, 21 Cal. 222.....	222	Commonwealth v. Ingraham, 7 Gray, 42	222
Clark v. Merchants' Bank, 2 N. Y. 222.....	222	Commonwealth v. Kidder, 120 Mass. 122.....	22
Clark v. Periam, 2 Ark. 222; 1 Runn. Or. 422.....	222	Commonwealth v. Lowell Gas-Light Co., 12 Allen, 72	12
Clark v. Tarbell, 22 N. H. 22	122	Commonwealth v. MacLoon, 121 Mass. 1	222
Clark v. Westrup, 12 C. B. 122.....	42	Commonwealth v. McDonough, 12 Allen, 221, 224.....	22
Clay v. Edgerton, 19 Ohio St. 422.....	210	Commonwealth v. McPike, 2 Cusk. 121.....	222
Clayton v. May, 27 Ga. 722	222	Commonwealth v. Morgan, 120 Mass. 122.....	222
Clemence v. City of Auburn, 22 N. Y. 222.....	222	Commonwealth v. O. C. R. Co., 14 Gray, 22	222
Clements v. Village of West Troy, 10 How. Pr. 122.....	222	Commonwealth v. Parker, 2 Pick. 222, 227.....	22
Cleveland, etc., R. Co. v. Munson, 22 Ohio St. 421.....	717	Commonwealth v. Pammora, 1 S. & R. 217.....	124
Cleveland, etc., Ry. Co. v. Newell, 72 Ind. 222.....	172	Commonwealth of Lagrange Co. v. Rogers, 22 Ind. 227.....	144
Clifford v. Dam, 21 N. Y. 22.....	222	Commonwealth v. Rumford Chemical Works, 12 Gray, 221, 222.....	22
Clippinger v. Hepbaugh, 2 Watts. & S. 222; 40 Am. Dec. 222.....	722, 723	Commonwealth v. Scott, 122 Mass. 222, s. c., 22 Am. Rep. 21.....	122
Cloud v. Webb, 4 Dev. 222.....	102	Commonwealth v. Temple, 14 Gray, 22, 77.....	22
Cloves v. Staffordshire Potteries, L. R., 3 Ch. App. 222.....	222	Commonwealth v. Wentz, 1 Ashm. 222.....	142
Club v. Mutual, etc., Insurance Co., 12 Allen, 222.....	472, 473, 474, 475	Commissioners v. Perry, 2 Ohio, 22	222
Clymer's Lessee v. Dawkins, 2 How. 222.....	102	Common Council v. State, 2 Ind. 222.....	222
Cotter's case, L. R., 17 Eq. 222; 7 Eng. Rep. 722.....	212	Concord R. v. Greeley, 22 N. H. 227.....	222
Cotter v. Gertach, 44 Penn. St. 42.....	112	Connecticut River Railroad v. County Commissioners, 127 Mass. 22; s. c., 22 Am. Rep. 222.....	22
Cobb v. Frell, 12 Fed. Rep. 77.....	422	Connor v. Coffin, 22 N. H. 222.....	222
Cockle v. South Eastern Ry. Co., 27 L. T. (N. S.) 222.....	277	Consett v. Reformed, etc., Church, 4 Lane 222.....	222
		Connelly v. Davidson, 22 Minn. 222; s. c., 22 Am. Rep. 222.....	222

TABLE OF CASES CITED.

XIX

	PAGE.		PAGE.
Conrad v. Lindley, 2 Cal. 178.....	682	Darke v. Martyn, 1 Beav. 525.....	745
Conwell v. Smith, 8 Ind. 520.....	165	Darling v. Bangor, 64 Me. 108.....	500
Cooke v. Cooke, Phil. 583.....	645	Darling v. Westmoreland, 52 N. H. 401..	613
Cook v. Ellis, 6 Hill, 401.....	368	Dascomb v. Railroad, 27 Barb. 221.....	626
Cook v. Pennsylvania, 97 U. S. 568....	160	Davidson v. Nebaker, 21 Ind. 334.....	495
Cooley v. Dewey, 4 Pick. 95.....	619	Davis' case, 132 Mass. 824.....	66
Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299.....	161, 292	Davis v. Clark, 26 Ind. 424.....	734
Coon v. Bean, 69 Ind. 474.....	483	Davis v. Garrett, 6 Bing. 716.....	174
Coppage v. Alexander, 2 B. Mon. 313; 88 Am. Dec. 153.....	483	Davis v. Gyde, 29 E. C. L. 166.....	280, 281
Corcoran v. Holbrook, 59 N. Y. 517; s. c., 17 Am. Rep. 389.....	404, 406, 413	Davis v. Merrill, 47 N. H. 208; 22 Monthly Law Rep. 385.....	305
Cornell v. Lamb, 20 Johns. 407.....	280	Davis v. Orme, 36 Ala. 540.....	816
Cornwell v. Deck, 8 Hun, 122.....	744	Davis v. Perrine, 4 Edw. Ch. 64.....	527
Cottrah v. Marmaduke, 60 Tex. 372.....	255	Davis v. Standish, 26 Hun, 608.....	206
Cotzhausen v. Judd, 43 Wis. 213; 28 Am. Rep. 539.....	148	Dawson v. Wrench, 3 Exch. 359, 362.....	309
Cokson v. City of Portland, Deady, 481..	425	Day v. Crossman, 1 Hun, 570; 4 T. & C, 122.....	665
County of Mobile v. Kimball, 103 U. S. 691.....	160, 292	Dearing v. Moffitt, 6 Ala. 776.....	811
Covell v. Hyman, 111 U. S. 178.....	519	DeBruler v. Ferguson, 54 Ind. 549.....	144
Covill v. Hill, 4 Denio, 323.....	707	DeForest v. Fulton Ins. Co., 1 Hall, 84, 91, 110, 116, 133.....	62
Cowan v. Iowa Ins. Co., 40 Iowa, 551; s. c., 20 Am. Rep. 563.....	22, 23	Delaney v. Root, 99 Mass. 546.....	692
Cowley v. People, 83 N. Y. 464; 88 Am. Rep. 464, and note, 474.....	191	Delaware, etc., R. Co. v. Naphes, 90 Penn. St. 135.....	188
Cox v. Midland, etc., Ry. Co., 3 Exch. 268.....	774	Dennis v. Clark, 2 Cush. 347, 351; 48 Am. Dec. 671.....	303
Coy v. City Council, 17 Iowa, 1.....	425	Denton v. English, 2 Nott. & McC. 581..	49
Craig v. First Presbyterian Church, 88 Penn. St. 42; s. c., 32 Am. Rep. 417....	120	DePuy's case, 3 Ben. 307.....	76
Craig v. Kittredge 46 N. H. 57.....	327	DePuy v. Swart, 3 Wend. 135; s. c., 20 Am. Rep. 673.....	810, 811
Craig v. State, 4 Pet. 410.....	134	Derman v. Home Ins. Co., 26 La. Ann. 69; s. c., 31 Am. Rep. 544.....	22, 23
Crandall v. Nevada, 6 Wall. 85.....	202	Deskin's case, 4 Leigh. 685.....	256
Crawford v. Collins, 45 Barb. 269.....	536	Detroit v. Blakeby, 21 Mich. 84; s. c., 4 Am. Rep. 450.....	498, 500
Crenshaw v. State, Mart & Yerg. 123.....	658	Detroit Post Co. v. McArthur, 16 Mich. 447.....	588
Cresse v. Park., 75 Me. 387; 46 Am. Rep. 406.....	590	Devanbaugh v. Devanbaugh, 5 Paige, 554.....	730
Crispell v. Dubois, 4 Barb. 393.....	387	Devitt v. Pacific Railroad, 50 Mo. 302..	397
Crispin v. Doklioni, 2 Swab. & Tris. 44..	618	Dewes v. Col. Co., 32 Tex. 570.....	203
Crist v. Crist, 1 Ind. 570.....	453	Dias v. State, 7 Blackf. 20.....	363
Croft v. Allison, 4 B. & Ald. 590.....	5	Dickenson v. Fletcher, L. R., 9 C. P. 1.	657
Cromartie v. Com'rs, 85 N. C. 211.....	266, 262	Dickerson v. Derrickson, 39 Ill. 574.....	310
Cromellen v. Brink, 5 Casey, 522.....	590	Dietrichs v. Lincoln, etc., R. Co., 13 Neb. 47.....	713
Crosby v. Mason, 83 Conn. 482.....	456	Dillard v. State, 58 Miss. 368.....	192
Crosby v. Wyatt, 23 Me. 156.....	4	Diligent Fire Co. v. Commonwealth, 75 Penn. St. 291.....	120
Cross v. Cross, 3 Paige, 139; 23 Am. Dec. 778.....	148	Dils v. Bridge, 23 W. Va. 20.....	255
Crump v. Morgan, 3 Ired. Eq. 91; 40 Am. Dec. 447.....	645	Dimmock v. Bixby, 20 Pick. 368, 377...	540
Cruzan v. Smith, 41 Ind. 288.....	760, 762	Dinham v. Bradford, L. R., 5 Ch. App. 519..	168
Cuddington v. Wilkins, Hob. 81.....	378	Disborough v. Neilson, 3 Johns. Cas. 81	414
Cuddy v. Horn, 46 Mich. 596; 41 Am. Rep. 178.....	762	Dively v. City of Cedar Falls, 27 Iowa, 227.....	423, 424
Cudworth v. Scott, 41 N. H. 456.....	305	Division of Howard Co., 15 Kans. 194..	203
Cueno v. Bessoni, 53 Ind. 524.....	488	Dix v. Mercantile Ins. Co., 23 Ill. 272, 20,	24
Culler v. Motzer, 13 Serg. & R. 358.....	106	Dixon v. Duke, 85 Ind. 434.....	438
Culver v. Rhovee, 87 N. Y. 354.....	103	Dob v. Halsey, 16 Johns. 34; 8 Am. Dec. 293.....	150
Cummings v. Gossett, 19 Vt. 310.....	345	Dodd v. City of Hartford, 25 Conn. 232.	288
Cummings v. State, 4 Wall. 277.....	226	Dodge v. Coffin, 15 Kans. 277.....	201
Cunningham v. Nat. Bk. of Augusta, 17 Cent. L. J. 470.....	447	Dollfus v. Frosch, 1 Den. 367.....	206
Curtis v. Detroit, etc., Ry. Co., 27 Wis. 158.....	160	Donley v. Camp, 22 Ala. 659; 58 Am. Dec. 274.....	310
Curtis v. Keesler, 14 Barb. 511.....	538	Donney v. Murphey, 1 Dev. & Batt. 91-2.	387
Curtiss v. Rochester, etc., R. Co., 29 Barb. 262.....	177	Dorr v. Insurance Co., 67 Me. 438.....	123
Cutter v. Butler, 25 N. H. 343, 350.....	328, 329	Dougall v. Foster, 4 Grant U. C. 319.	693
Cutting v. Gilman, 41 N. H. 147, 153.....	327	694, 695
Cuyler v. Ferrill, 1 Abb. (U. S.) 169.....	205	Douglass v. Cooper, 3 M. & K. 378.....	330
		Douglass v. Harrisville, 9 W. Va. 162..	286
Daley v. Worcester, etc., R. Co., 26 Conn. 501.....	717	Douglas v. Howland, 24 Wend. 85.....	303
Dana v. National Bank, 13 Allen, 445....	232	Dovaston v. Paine, 2 Sm. L. C., H. & W., notes, 213, 216, 232, 234, 235, 237, 238.....	312
Dandridge's case, 2 Va. 408.....	271	Doyal v. Smith, 28 Ga. 262.....	483
Daniel v. Hill, 52 Ala. 430.....	387	Drake v. Drake, 4 Dev. 110.....	653
Daniel v. Metropolitan Ry. Co., L. R., 3 C. B. 501.....	628	Drake v. Kiely, 93 Penn. St. 492.....	173

TABLE OF CASES CITED.

	PAGE.		PAGE.
Duke's Lessee v. Ramsey, 5 Ohio, 354.	302	Ewing v. French, 1 Blackf. 303.	433
Draper v. Crofts, 15 Mees. & Wels. 100	313	Ex parte Adams, 25 Minn. 605.	361
Drew v. Draw, 8 Fret. 437.	440	Ex parte Biggs, 64 N. C.	361
Drennon v. London Assurance Corporation, U. S. Circ. Minnesota ..	34	Ex parte Bollenau and Swartout, 4 Cranch, 81.	306
Drummond's case, 4 Ch. App. 773.	316	Ex parte Burr, 9 Wheat. 529.	360
Drymala v. Thompson, 26 Minn. 40.	400	Ex parte Edwards, 11 Fla. 185.	350
Duncan v. Berlin, 60 N. Y. 141.	301	Ex parte Edwards, 11 Fla. 174.	308
Duerson v. Ballows, 1 Blackf. 217.	103	Ex parte Garland & Wall 323.	370
Dunham v. State, 6 Iowa, 245.	300, 303	Ex parte Hardy, 68 Ala. 303.	350
Dunlap v. Wagner, 36 Ind. 300; s. c., 44 Am. Rep. 42.	175, 475	Ex parte Hickey 4 Sm. & M. 776.	350
Dunlop v. Patterson Fire Insurance Co., 74 N. Y. 145; s. c., 30 Am. Rep. 303.	301	Ex parte Moore, 63 N. C.	361
Dunnell v. Kestelias, 14 Abb. Pr. 305.	106	Ex parte Moore, 63 N. C. 307.	370
Durkin v. City of Troy, 61 Barb. 437.	603	Ex parte Reno, 68 Mo. 206, s. c., 37 Am. Rep. 37.	75, 77
Dusenbury v. Hoyt, 53 N. Y. 521; s. c., 13 Am. Rep. 543.	313	Ex parte Robinson, 19 Wall 510.	374
Dusenbury v. Mutual Telegraph, 11 Abb. New Cas. 440.	19	Ex parte Sargeant, 1 Rose, 153.	305
Dutch Church v. Bradford, 8 Cow. 402.	405	Ex parte Schenck, 65 N. C. 353.	351
Dyer v. Armstrong, 6 Ind. 437.	783	Ex parte Smith, 3 McLean, 121.	70
Dyer v. Osborne, 11 R. I. 301.	150	Ex parte Steinman, 95 Penn. St. 200; s. c., 40 Am. Rep. 537.	353
Eagan v. State, 36 Ind. 100.	778	Ex parte Swearingen, 13 S. C. 74.	70
Eames v. New England Worsted Co., 11 Met. 370.	33	Ex parte Thompson, 1 Mont. & McArthur, 112.	320
Earle v. Kingsbury, 3 Cush. 308.	340	Eyton v. Studd, 2 Plowden, 405.	307
Early v. State, 9 Tex. Ct. App. 405.	191	Falkney v. Reynolds, 4 Burr. 3008.	135
East St. Louis v. East St. Louis, etc. Co., 30 Ill. 415.	403	Fair v. Stevenot, 20 Cal. 484.	100
Eastman v. Clark, 35 N. H. 370, 394; s. c., 14 Am. Rep. 130.	315, 316	Fairbanks v. Kerr, 70 Penn. St. 68; s. c., 10 Am. Rep. 684.	176
Eastman v. Plumer, 44 N. H. 404.	610	Fairlie v. Denton, 3 Carr. & P. 100.	513
Eaton v. Avery, 33 N. Y. 31; s. c., 30 Am. Rep. 201.	304	Fall v. Hazelrigg, 45 Ind. 576; s. c., 15 Am. Rep. 276.	405
Eaton v. Boston, etc., R. Co., 11 Allen, 500.	174	Farley v. Kelly, 68 N. C. 227; s. c., 43 Am. Rep. 743.	320
Edgell v. McLaughlin, 6 Whart. 170; 26 Am. Dec. 114.	571	Farmers', etc. Bank v. Troy City Bank, 1 Doug. (Mich.)	770
Edwards v. Leavitt, 46 Vt. 134.	300	Farnsworth v. Stiers, 5 Cush. 412.	344
Egan v. State, 53 Ind. 102.	304	Farnum v. Concord, 2 N. H. 302.	606
Egberts v. Wood, 3 Paige, 308.	340	Farrow v. Andrews, 60 Ala. 90.	305
Eggers v. Eggers, 57 Ind. 461.	400	Farwell v. Boston and Worcester R. Co., 4 Met. 49.	407
Elkins v. Kenyon, 34 Wis. 98.	300	Faulkner v. Erie R. Co., 40 Barb. 204; 30 N. Y. 463.	300
Ellis v. Hedden 12 Kaus 306.	304	Fay v. Parker, 53 N. H. 342; s. c., 10 Am. Rep. 270.	370, 371, 376
Elleberry v. Boykin, 65 Ala. 300.	74	Fee v. Fee, 10 Ohio, 409, 36 Am. Dec. 103.	370
Elson v. O Dowd, 40 Ind. 300.	704	Fenno v. Weston, 31 Vt. 345.	510
Elwell v. Burnside, 44 Barb. 447.	600, 601	Ferraris v. Vasconcellos, 31 Ill. 25.	400
Elwood v. Flannigan, 104 U. S. 600.	305	Ferris v. Henderson, 2 Jones, 49.	370
Enderby v. Gilpin, 5 Moore, 371.	445	Foster v. Simpson, 50 Ind. 33.	401, 400
Englander v. Rogers, 41 Cal. 401.	300	Pield's Estate, 2 Rawle, 351, 37 Am. Dec. 454.	610
English v. Beard, 51 Ind. 400.	175	Findlay v. Smith, 6 Mumf. 134.	600, 604
English v. Smock, 24 Ind. 115; s. c., 7 Am. Rep. 315.	704	First Congregational Society v. Miller, 15 N. H. 522.	245
Ennis v. Smith, 14 How. (N. S.) 400.	305	First Nat. Bank v. Deitch, 33 Ind. 131.	704
Erhardt v. S. F. & S. J. R. Co., 35 Cal. 220.	361	First Nat. Bank, etc. v. Gruber, s. c., 30 Am. Rep. 373.	300
Erickson v. Willard, 1 N. H. 317.	304	First Nat. Bank v. Reno Co. Bank, 1 McCrary, 491.	300
Erie v. Magill, 101 Penn. St. 410; s. c., 47 Am. Rep. 739.	313	First Universalist Society of North Adams v. Fitch, 3 Gray, 421.	144
Erickson v. Moulton, 60 Me. 370.	313	Fitzpatrick v. Great Western Ry. Co., 12 U. C. Q. 645.	170
Erwin v. Fulk, 94 Ind. 323.	700	Fisher v. Hildreth, 117 Mass. 656.	310
Evans v. Carey, 29 Ala. 99.	320, 311	Fisher v. N. Y. Cent. R. Co., 46 N. Y. 644.	600
Evans v. Davidson, 53 Md. 345; s. c., 26 Am. Rep. 400.	700	Fitzgerald v. Alexander, 18 Wend. 600.	310
Evans v. Merriken, 8 Gill, & J. 30.	305	Fitzgerald v. Robinson, 113 Mass. 371.	400
Evansville, etc. R. Co. v. Baum, 30 Ind. 70.	704, 705	Flannery v. Waterford, etc. Ry. Co., 11 Irish C. L. 20.	170
Evansville, etc. R. Co. v. Duncan, 30 Ind. 441.	100	Flavell's case, 6 Watts & S. 197.	600
Evansville, etc. v. Smith, 65 Ind. 98.	300	Flike v. Boston and Albany R. Co., 38 N. Y. 549; s. c., 13 Am. Rep. 545.	404
Evarts v. Middlebury, 50 Vt. 600.	100	Flint v. Norwich and N. Y. Trans. Co., 24 Com. 554.	540
Everingham v. Bosworth, 7 Wend. 300.	100		
Everingham v. Melghan, 55 Wis. 354.	445		
Eversole v. Cook, 65 Ind. 300.	702		
Ewart v. Jones, 14 M. & W. 774.	601		
Ewen v. Bannerman, 3 Dow. & G. 74; s. c., 4 Wils. & Sh. 540.	300		

TABLE OF CASES CITED.

xxi

PAGE.	PAGE.
<i>Myat v. Bodenhamer</i> , 60 N. C. 305. 480	<i>Glauf v. Neval</i> , 51 Penn St. 316. 80
<i>Force and Hambley's case</i> , 4 Co. 61; 1 Jarm. 108; 4 Kent Com. 208. 331	<i>Gleason v. Hestonville, etc.</i> , R. Co., 81 Penn 81 172. 717
<i>Fogarties v. Skillman</i> , 13 Rich. 518. 332	<i>Goddard v. Glominger & Watts</i> , 219. 308
<i>Fontaine v. Boatmen's Savings Institution</i> , 57 Mo. 661. 316	<i>Goddard v. Grand Trunk Railway Co.</i> , 57 Me. 232 & C. 2 Am. Rep. 30. 688
<i>Fonville v. Casey</i> , 1 Murph. (N. C.) 309; 4 Am. Dec. 226. 306	<i>Goewey v. Crig</i> , 15 Ill. 242. 105
<i>Ford v. Fitchburg R. Co.</i> , 110 Mass. 241; 2 C., 14 Am. Rep. 308. 405	<i>Goings v. Emery</i> , 18 Pick. 107. 144
<i>Forka v. Township v. King</i> , 84 Penn. St. 390. 588	<i>Goldend v. Lunbridge Wells Improvement Commissioners</i> , L. R., 1 Ch. App. 349, 354. 590
<i>Forman v. Proctor</i> , 9 B. Mon. 124. 305	<i>Goldsmith v. Sawyer</i> , 48 Cal. 209. 308
<i>Foscoe v. Lyon</i> , 55 Ala. 440. 302	<i>Gordon v. McCartney</i> , 10 Tex. 195. 358
<i>Fosselman v. Elder</i> , 98 Penn. St. 100. 451	<i>Gordeno v. Hutchinson</i> , 54 N. H. 158. 312
	<i>Gordeno v. Ewer</i> , 16 Cal. 461. 695
	<i>Gordhue v. Clark</i> , 35 N. H. 205. 307
<i>Fothergill's case</i> , L. R., 5 Ch. App. 370. 316	<i>Gording v. Morgan</i> , 70 Ill. 375. 301, 306
<i>Fountain v. Draper</i> , 40 Ind. 441. 173	<i>Goodright v. Moss, Corp</i> , 591. 615, 618
<i>Fowler v. Shearer</i> , 7 Mass. 31. 87	<i>Goodright v. Saul</i> , 4 Tenn. 358. 148
<i>Fox v. Com.</i> , 51 Penn. St. 516. 323	<i>Goodspeed v. East Haddam Bank</i> , 20 Conn. 530. 308
<i>Foy v. Reddick</i> , 31 Ind. 414. 156	<i>Goodwin v. State</i> , 95 Ind. 550. 477
<i>Franklin v. South Eastern Ry.</i> , 3 H. & N. 211. 308	<i>Goodwyn v. Spray</i> , 2 Dick. 607. 605
<i>Franklin Fire Ins. Co. v. Gruver</i> , 100 Penn. St. 308. 324	<i>Gordon v. B & M Railroad</i> , 58 N. H. 306. 618
<i>Fraser v. Tupper</i> , 20 Vt. 403. 549	<i>Gordon v. Tweedy</i> , 51 Ala. 203. 314
<i>French v. P. W. & B. R. Co.</i> , 39 Md. 674. 605	<i>Goring v. McTaggart</i> , 92 Ind. 300. 732
<i>Freeman v. Falconer</i> , 44 N. Y. Sup. Ct. (13 J. & B.) 128. 401	<i>Goswiler's Appeal</i> , 3 P. & W. 300. 301
<i>French v. City of Burlington</i> , 48 Iowa. 614. 484	<i>Gould v. Ins. Co.</i> , 47 Mo. 403. 324
<i>Frolo v. Brown</i> , 4 Mass. 675. 303	<i>Gourlay v. Duke of Somerset</i> , 19 Ves. 420. 105
<i>Frisemouth v. Ins. Co.</i> , 10 Oush. 307. 384	<i>Government Street R. Co. v. Hanlan</i> , 51 Ala. 70. 717
<i>Fry's Election case</i> , 71 Penn. St. 302; 2 C., 10 Am. Rep. 426. 600	<i>Grand Rapids Railroad v. Helsol</i> , 38 Mich. 82. 15
<i>Fuller v. Dame</i> , 18 Pick. 473. 217	<i>Grand Trunk R. Co. v. Richardson</i> , 91 T. 8 454. 618
<i>Fuller v. Randall</i> , 3 Moore & P. 24. 618	<i>Grangers Life Ins. Co. v. Brown</i> , 87 Miss. 305, 2 C., 34 Am. Rep. 448. 180
	<i>Grant v. City of Davenport</i> , 33 Iowa. 305. 495
<i>Gaff v. Greer</i> , 95 Ind. 122; 2 C., 45 Am. Rep. 449. 405	<i>Grant v. State</i> , 55 Ala. 301. 304
<i>Gage v. Lewis</i> , 66 Ill. 604, 618. 310	<i>Grass v. Hess</i> , 37 Ind. 193. 710
<i>Gage v. Mechanic's Bank</i> , 70 Ill. 69. 310	<i>Graves v. White</i> , 87 N. Y. 465. 633
<i>Ganaway v. State</i> , 38 Ala. 772. 197, 198	<i>Gray v. Bates</i> , 3 Stroh. 500. 105
<i>Gannon v. Union Ferry Co.</i> , 20 Hun, 481. 30	<i>Gray v. Roberts</i> , 2 A. K. Marsh. 306. 40
<i>Gardner v. Eberhardt</i> , 20 Ill. 318. 305	<i>Grayson's case</i> , 6 Gratt. 712. 809
<i>Garrison v. Howe</i> , 17 N. Y. 466. 410	<i>Greason v. Keteltas</i> , 17 N. Y. 461. 103
<i>Gaskill v. Skene</i> , 14 Q. B. 604. 610	<i>Greathouse v. Smith</i> , 4 Ill. (3 Scam.) 541. 404
<i>Gates v. Barrett</i> , 79 Ky. 205. 300	<i>Great W. Turnpike Co. v. Locusts</i> , 38 N. Y. 127. 793
<i>Gaudy v. State</i> , 12 Neb. 445. 306	<i>Green In re</i> , 7 Bias. 328. 445
<i>Gee v. Bremen</i> , 60 Me. 222. 600	<i>Green v. Covilland</i> , 10 Cal. 317. 602
<i>Gee v. Metropolitan Railway Co.</i> , L. R., 9 Q. B. 161; 5 Eng. R. 130; L. T. Rep. 622. 30	<i>Green v. Lister</i> , 4 Cr. 220, 230. 105
<i>Gee v. Ward</i> , 7 H. & B. 514. 616	<i>Green v. Omnibus Co.</i> , 7 C. B. (N. B.) 254. 300
<i>George v. Cutting</i> , 45 N. H. 120. 320	<i>Green v. Van Buskirk</i> , 7 Wall. 180. 180
<i>Gerdes v. Moody</i> , 41 Cal. 306. 602	<i>Greencastle Turnpike v. Black</i> , 5 Ind. 577. 713
<i>German Reformed Church v. Balbert</i> , 5 Penn. St. 212. 342, 343, 400, 405	<i>Greenleaf v. Illinois Central Railroad Co.</i> , 29 Iowa. 14. 400
<i>Gerrish v. Gerrish</i> , 5 Orag. 251; 2 C., 34 Am. Rep. 655. 454	<i>Greenleaf v. Kilton</i> , 11 N. H. 600. 312
<i>Gerrish v. New Bedford Savings Inst.</i> , 118 Mass. 160; 2 C., 25 Am. Rep. 300. 327	<i>Gregory v. Michael</i> , 18 Ves. Jr. 395. 105
<i>Gering v. Sitterly</i> , 16 N. Y. 217. 450	<i>Gregory v. Paul</i> , 15 Mass. 31. 85
<i>Getchell v. Hill</i> , 21 Minn. 471. 458	<i>Gregory v. Pierce</i> , 4 Metc. 473. 80
<i>Getchell v. Whittemore</i> , 73 Me. 208. 450	<i>Gregory v. Wende</i> , 36 Mich. 337; 2 C., 38 Am. Rep. 30. 304, 445
<i>Gibson v. Armstrong</i> , 7 B. Mon. 481. 406	<i>Griffin v. Hansdell</i> , 71 Ind. 440. 152, 155
<i>Gilbert v. Flint, etc.</i> , R. Co., 47 Am. Rep. 608. 306	<i>Griffith v. Reed</i> , 21 Wend. 503. 8
<i>Gill v. Pauntieroy's Heirs</i> , 5 B. Mon. 186. 105	<i>Grinn v. Curley</i> , 41 Cal. 251. 100
<i>Gillett v. Gaffney</i> , 3 Colo. 304. 343	<i>Grimes v. Harmon</i> , 35 Ind. 193, 204; 9 Am. Rep. 630. 424
<i>Gillenwater v. Madison, etc.</i> , R. Co., 5 Ind. 300. 173	<i>Grizewood v. Balne</i> , 11 C. B. 306. 448
<i>Gilman v. Philadelphia</i> , 3 Wall. 713. 200	<i>Gravenor v. United Society</i> , 118 Mass. 78. 405
<i>Gilmore v. Bowden</i> , 13 Me. 413. 450	<i>Gurnee v. Maloney</i> , 38 Cal. 65. 80
<i>Glander v. Farnum</i> , 16 Penn. St. 95. 455	
<i>Ginna v. Second Avenue R. Co.</i> , 6 Hun, 424. 373	<i>Haber v. Klauberg</i> , 3 Mo. App. 343. 308
	<i>Habergham v. Vincent</i> , 2 Vesey Jr. 395. 400

	PAGE.		PAGE.
Black v. Stewart, 3 Penn. St. 313...	506	Hawley v. Beverly, 3 M. & G. 221...	3
Blackney v. State, 3 Ind. 404...	726	Hawley v. Hibb, 30 Ala. 20...	319
Haddock v. D. & M. Railroad, 3 Allen, 300	613	Hawley v. Clowes, 2 Johns Ch. 120...	694
Haffey's Heirs v. Hichetta, 11 Leigh, 20	247	Hayden v. Smithville M. Co., 3 Conn. 540	390
Hagan v. Latons, 10 Pet. 404...	513	Hayden v. Tucker, 20 Mo. 214	730
Hall v. State, 3 Tex. App. 170...	303	Hayes v. N. Y. Cent. & H. Co., 30 Alb. L. J. 409	660
Hale v. Angel, 20 Johns. 312...	696	Hays v. Miller & Hun, 220, 70 N. Y. 113	326
Hall v. Brennan, 20 Cal. 512...	66	Hayward v. Barker, 34 Va. 420, s. C., 30 Am. Rep. 762, and note, 764	37
Haley v. Clark, 30 Ala. 430...	236	Hayward v. Stearns, 20 Cal. 56	90
Hall v. Brown, 40 N. H. 90...	310	Heady v. State, 60 Ind. 312, 323	454
Hall v. Brown, 26 N. H. 20...	610	Heath v. Coltenback, 5 Iowa, 400	120
Hall v. Commonwealth, Hardin (Ky.) 400...	140	Hedge v. Sims, 20 Ind. 574	620
Hall v. De Cuir Adm'r, 36 U. S. 405	300	Henderson v. Bacon, 9 Eng. L. & Eq. 327	300
Hall v. Hollander, 4 B. & C. 690	300	Henderson v. Mayor, 20 U. S. 200, 200, 200	300
Hall v. Warren, 3 Ves. Jr. 605	100	Henry v. Gregory, 20 Mich. 87	300
Hall v. Warren 9 H. L. Cas. 420	300	Herron v. Keeran, 50 Ind. 472, s. C., 20 Am. Rep. 57	137
Hall v. Young, 37 N. H. 134	300	Hesketh v. Murphy, 25 N. J. Eq. 22	144
Ham v. Smith, 37 Penn. St. 63	120	Hewett v. Swift, 3 Allen, 420	710
Ham v. Kendall, 111 Mass. 207	145	Heywood v. Tillson, 75 Me. 205; 41 Am. Rep. 373	417
Hamilton v. Amaden 28 Ind. 304	720	Hibblewhite v. McMorris, 5 M. & W. 463	444
Hamilton v. Whitridge, 11 Md. 120	720	Hibbs v. Blair, 3 Harris, 413	300
Hammond v. Gilmore, 14 Conn. 470	320	Hibler v. State, 43 Tex. 197	70
Hamper's Appeal, 51 Mich. 71	300	Hickey v. Boston & Lowell Railroad, 14 Allen, 429	20
Hanna v. Flint, 14 Cal. 73	245	Hickman v. O'Neal, 10 Cal. 200	720
Hanna v. Rolton, 78 Penn. St. 304; s. C., 21 Am. Rep. 20	304	Higgins v. Dewey, 107 Mass. 404, s. C., 9 Am. Rep. 63	300
Harbor v. Morgan 4 Ind. 150	440	Highnote v. White, 67 Ind. 500	420
Hard v. City of Decorah, 43 Iowa, 312	300	Hight v. Bacon, 126 Mass. 10, 30 Am. Rep. 630	300
Hardesty v. Fleming, 57 Tex. 306	120	Hihu v. Peck, 18 Cal. 640	620
Hardin v. Baptist Church, 51 Mich. 137; s. C., 47 Am. Rep. 555	120	Hill v. Boston, 122 Mass. 244, s. C., 20 Am. Rep. 322	100
Harher v. Addis, 4 Penn. St. 515	301	Hill v. Burns, 3 Wils. & Sh. 60	200
Harker v. Mayor, etc., 17 Wend. 300	300	Hill v. Crandall, 52 Ill. 70	300
Harlow v. Marquette, etc., R. Co., 41 Mich. 300	150	Hill v. P. & R. Railroad Co., 55 Me. 420	612
Harmon v. Brown, 50 Ind. 307	400	Hill v. Pratt, 29 Vt. 119	612
Harmon v. Brown, 70 Ind. 413	400	Hill v. West, 5 Ohio, 222, 31 Am. Dec. 442	67
Harmos v. Dreher, 1 Spear's Eq. 67	240	Hillard v. Walker, 11 Ill. 644	120
Harrigan v. Connecticut River, etc., Co., 120 Mass. 520; s. C., 27 Am. Rep. 307	101	Hillman v. Newington, 57 Cal. 66	540
Harris v. Doe, 4 Blackf. 300	400	Himmelman v. Hoadley, 44 Cal. 213	200
Harris v. Warner, 13 Wend. 400	4	Hinckley v. Baxter 13 Allen, 100	100
Harrison v. Collins, 60 Penn. St. 100; s. C., 27 Am. Rep. 400	115	Hinkley v. Green, 52 Ill. 230-233	100
Harrison v. Lockhart, 20 Ind. 113	620	Hinson v. Lott, 5 Wall 145	101
Harrison v. Mayor, etc., 3 Sm. & M. 601	101	Hipes v. Cochran, 13 Ind. 175	720
Harrison v. State, 20 Md. 400	645	Hitchins v. Hardley, L. R., 2 P. & D. 248	610
Harshman v. Armstrong, 45 Ind. 120	3	Hoadley v. McLaine, 10 Bing. 422	65
Hart v. Tulk, 3 De G., M. & G. 311	307	Hoag v. Railroad Company, 56 Penn. St. 253, s. C., 27 Am. Rep. 653	600
Hart v. State, 40 Al. 20	307	Hobbs v. Memphis Ins. Co., 1 Sneed. 444	20
Hartford Fire Ins. Co. v. Rose, 20 Ind. 120	26	Hobbs v. Memphis, etc., R. Co., 9 Heisk. 373	300
Hartman v. Avelina, 62 Ind. 344	60	Hodden v. Lloyd, 3 Br. Ch. C. 521, 522	200
Harvey v. Rose, 26 Ark. 8; 7 Am. Rep. 305	400	Hodgson v. Jeffries, 52 Ind. 334	100
Harvey v. State, 40 Ind. 516	171, 476	Hodgson v. Shaw, 3 Myl. & K. 150	307
Haskell v. New Bedford, 120 Mass. 205, 216	30	Hoen v. Simmonds 1 Cal. 119	620
Hassell v. Minell, 6 Ind. Eq. 205	640	Hoffman v. Etna Ins. Co., 23 N. Y. 400	20
Hatch v. Hobbs, 13 Gray, 447	20	Hoffman v. N. Y. Cent., etc., R. Co., 57 N. Y. 25, 41 Am. Rep. 237	700
Hatch v. Mutual Ins. Co., 120 Mass. 600; 21 Am. Rep. 341	473	Hoffman v. State 12 Tex. App. 406	300
Hatch v. Vermont Central Railroad, 26 Vt. 142, 147	20	Hoffman v. State 12 Tex. App. 406	300
Hatchell v. Kimbrough, 4 Jones L. 100	775	Hobbs v. Railroad, 12 N. Y. 230	300
Hathfield v. Roper, 31 Wend. 615; 31 Am. Dec. 273	717	Holten v. Fitchburgh R. Co., 120 Mass. 268	411
Hathfield v. St. Paul & D. R. Co., Minn. 727	727	Holdship v. Patterson, 7 Watts, 547	500
Hathaway v. State Ins. Co., Iowa Supreme Court, July, 1894	20	Hole v. Thomas, 7 Ves. 500	600
Hauberger v. Root, 6 W. & A. 421	464	Holladay v. Kennard, 12 Wall 254	110
Hawes v. Knowles, 114 Mass. 515; s. C., 19 Am. Rep. 305	600	Hollingsworth v. Trueblood, 50 Ind. 500	720
Hawkins v. Skeggs 10 Humpb. 20	400		
Hawks v. Winans, 40 N. Y. Super. 401; affirmed, 74 N. Y. 600	20		

TABLE OF CASES CITED.

xxiii

PAGE.	PAGE.		
Bellcher v. Hollister, 25 Mo. 307.	312	In re Countess of Durham, 5 Ostr. 37.	445
Bellman v. Broughton, 10 Wend. 10.	395	In re Daves, 51 N. C. 19.	399
Bellman v. Carley, 21 N. Y. 230.	357	In re Hooper, 35 Wis. 430.	40
Bellman v. Hunt, 120 Mass. 205.	16	In re Paschal, 10 Wall. 450.	40
Bellman v. State, 2 G. Greene, 601.	167	In re Walker, 25 N. C. 95.	395
Bellman v. Delling Spring Bleaching Co., 14 N. J. Eq. 384.	399	In re White, 20 L. J. 35.	415
Bell v. Green, 15 Penn. St. 120; s. c.	120	Insurance Company v. Robertshaw, 20 Penn. St. 120.	375
Bell v. Wood, 9 Ind. 300.	395	Insurance Co. v. Beaver, 19 Wall. 321.	470
Bellman v. Gilman, 20 Wis. 470.	395	Ins. Co. v. Speakable, 20 N. H. 55.	395
Bellman v. Foster, L. R., 19 Eq.	395	Ireland v. Montgomery, 24 Ind. 174.	165
Bell v. 11 Reg. Rep. 320.	395	Ireland v. Turnpike Co., 19 Ohio St. 373.	395
Bell v. Graves, 7 Mag. 705.	395	Iron Mountain Rk. v. Mercantile Bk., 4 Mo. App. 305.	395
Bell v. Howell, 45 Ga. 9.	395	Iron R. R. Co. v. Mowery, 20 Ohio St. 415; s. c., 20 Am. Rep. 397.	395
Bell v. Starkey, 27 Ill. 10.	395	Irons v. Keutner, 51 Iowa, 35; s. c., 20 Am. Rep. 119.	400
Bell v. Railroad Co., 100 U. S. 210-12.	395	Irvine v. Irvine, 9 Wall. 497.	395
Bell v. Manuf. Ins. Co., 3 Met. 114.	395	Irvine v. Wood, 51 N. Y. 224; s. c., 20 Am. Rep. 395.	395
Bell v. Patten, 25 N. H. 318.	395	Isaac v. Third Ave. R. Co., 41 N. Y. 120; s. c., 7 Am. Rep. 410.	395
Bell v. R. Co. v. Fredericks, 61 Am. Rep. 35.	395	Isaacson v. N. Y. Cent., etc., R. Co., 24 N. Y. 373.	395
Bell v. Gambell, W. & W. Cond. 3.	395	Ivey v. Pifer, 11 Ala. 305.	395
Bell v. Newmarch 12 Allen, 42.	395	Isard v. Dodino, 3 Stock. 405.	395
Bell v. Nichols 21 Me 173.	395	Jackson v. Bowen, 7 Cow. 14.	395
Bell v. Throckmorton, 10 Cal. 60.	395	Jackson v. Browner, 15 Johns. 37, 39.	395
Bell v. White 44 N. H. 45.	395	Jackson v. Carpenter, 11 Johns. 39.	395
Hubbard v. Hubbard 13 Me 195.	395	Jackson v. Edwards, 7 Pal. 305.	395
Hubbard v. Wood 1 Need 205.	395	Jackson v. Greene County, 70 N. C. 305.	395
Hugh v. State 8 Tex. 7 App. 397.	395	Jackson v. Jackson, 19 Mag. L. & E. 545.	395
Hugh v. Van Burkes 25 Mo 305.	395	Jackson v. Jackson, 1 Sm. & Giff. 104.	395
Hughes v. Decker 25 Me 153, 155.	395	Jackson v. Moncrief, 5 Wend. 20.	395
Hughes v. People, 3 Col. 435.	395	Jackson v. Turner, 5 Leigh, 110.	395
Hulbert v. N. Y. C. & H. Co., 45 N. Y. 145.	395	Jackson v. Yaudes, 7 Blackf. 305.	395
Hulst v. Inlow, 27 Ind. 423; s. c., 20 Am. Rep. 34.	395	Jacobs v. Stokes, 15 Mich. 301.	395
Hummel's Case, 9 Watts, 451.	395	J'Anson v. Stuart, 1 T. R. 745.	395
Hummel and Bishop, 9 Watts, 415.	395	James v. Allen, 3 Mor. 17.	395
Humphries v. Johnson 20 Ind. 110.	395	James v. Johnson, 15 Bradw. 305.	395
Hunt v. Bridgman, 3 Fitch. 301; 15 Am. Dec. 405.	395	Jarrett v. Jarrett, 11 W. Va. 304, 305.	395
Hunt v. Johnson, 4 Am. Rep. 391.	395	Jefferson Ins. Co. v. Outham, 7 Wood. 73.	395
Hunt v. Rousmanier, 3 Wheat. 174.	395	Jeffersonville Am'n v. Fisher, 7 Ind. 305.	395
Hutchinson v. York, New Castle and Warwick R. Co., 5 N. H. 305.	395	Jeffersonville, etc., R. Co. v. Hendricks, 10 Ind. 305.	395
Hyde v. Jamaica, 27 Vt. 445, 450.	395	Jeffersonville, etc., R. Co. v. Hendricks, 41 Ind. 45.	395
Ibinger v. State, 25 Ind. 301.	395	Jeffersonville, etc., R. Co. v. Parmelee, 51 Ind. 45.	395
Ikin v. Brook, 1 B. & A. 124; 20 Mag. C. L. 397.	395	Jeffersonville, etc., R. Co. v. Milley, 20 Ind. 305.	395
Imley v. Union Branch Railroad, 25 Conn. 305, 315.	395	Jefferson R. Co. v. Rogers, 20 Ind. 7.	395
Indianapolis, etc., R. Co. v. Case, 15 Ind. 45.	395	Jeffersonville R. Co. v. Rogers, 20 Ind. 115, s. c., 10 Am. Rep. 395.	395
Indianapolis, etc., R. Co. v. Collinswood, 71 Ind. 470.	395	Jenkins v. Davis, 10 Q. B. 315, 320.	395
Indianapolis, etc., R. Co. v. Hunt, 20 U. S. 301.	395	Jenkins v. Hughes, 3 H. L. Cas. 571.	395
Indianapolis, etc., R. Co. v. McClaren, 25 Ind. 305.	395	Jenkins v. Jenkins, 20 Ind. 150.	395
Indianapolis, etc., R. Co. v. Morris, 27 Ill. 305.	395	Jennens v. Emerson, 10 N. H. 405; Schou. Dom. Rel. 344, 351.	395
Indianapolis R. v. Rutherford, 20 Ind. 30.	395	Jersey City and Bergen Railroad v. Jersey City and Hoboken Horse Railroad, 20 N. J. Eq. 61.	395
Indianapolis, etc., R. Co. v. Stephens, 20 Ind. 305.	395	Jewell v. Jewell, 1 How. 315, 321.	395
Indianapolis, etc., R. Co. v. Thomas, 24 Ind. 304.	395	Johnson v. Boston, 110 Mass. 405, 414.	395
Isle v. State, 3 Blackf. 374.	395	Johnson v. Chicago, etc., R. Co., 25 Iowa, 315.	395
Inhabitants of Warrington v. Eaton, 11 Am. 305.	395	Johnson v. City of Rochester, 15 Hun, 395.	395
Isle v. State, 45 Ga. 477.	395	Johnson v. Clarkson, 3 Rich. 305.	395
In re Almonico, 3 Jur. (N. S.) 305; 1 B. & Tr. 305.	395	Johnson v. Hotyoke, 105 Mass. 40.	395
In re Clark, 9 Wend. 115.	395	Johnson v. Insurance Co., 70 Ky. 305.	395
In re Cooper, 20 Vt. 397.	395	Johnson v. Lawson, 3 Bing. 30.	395

PAGE.	PAGE.
Johnson v. Newton, 11 Harv. 222.....	741
Johnson v. Wiley, 18 Os. 97.....	99
Johnson v. Stebbing, 3 Ind. 224.....	126
Jones v. Leonard, 60 Iowa, 100; & C., 22 Am. Rep. 116.....	99
Joyce v. Maine Ice Co., 45 Me. 222.....	224
Judge v. Connecticut Ins. Co., 125 Mass. 621.....	22
Judge v. Pike, 2 Spears, 422.....	226, 221
June v. Holliday, 2 Manley, 246.....	446
K. P. Ry. Co. v. Landon Adm'v., 3 Cal. 24.....	975
Kachler v. Dobberpubl, 22 Wis. 420.....	222
K. P. Ry. Co. v. Miller, 3 Cal. 442.....	975
Kaiser v. St. Paul, Stillwater and Tay- lor's Falls Railroad, 22 Minn. 140.....	16
Kaufelt v. Modarwell, 21 Penn. 222.....	222
Kautzman v. Weirick, 22 Ohio 222.....	210
Kauting v. N. Y., etc., R. Co., 40 N. Y. 672.....	767
Kessler v. Niagara Fire Ins. Co., 15 Wis. 422.....	24
Keon v. Priest, 1 Post. & Fin. 214.....	210
Kelth v. Drinnell, 22 Vt. 222.....	210
Keller v. Lewis, 15 Cal. 114.....	222
Kelley v. State, 22 Ind. 211.....	271
Kelso v. Kelly, 1 Daly, 410.....	126
Kelley v. State, 22 Ind. 211.....	476
Kennedy v. Mayor, 12 N. Y. 222; & C., 22 Am. Rep. 122.....	427
Kennor v. Harding, 22 Ill. 222; & C., 22 Am. Rep. 214.....	222
Kennedy v. Niles, 14 Me. 24.....	222
Kent v. Miltenberger, 12 Mo. App. 222.....	442
Kanyon v. Quinn, 41 Cal. 222.....	222
Kessel v. Alberts, 22 Barb. 222.....	222
Kay City, etc., Co. v. Munsell, 10 Iowa, 222.....	222
Kaysor v. Evans, 22 Penn. 222.....	104
Kaysor v. School District, 22 N. H. 222.....	104
Kilborn v. Field, 22 Penn. 222.....	104
Kimball v. Ins. Co., 3 Gray, 22.....	224
Kimball v. Merchants' Savings, etc., Co., 22 Ill. 211.....	222
Kimball v. Schoff, 22 N. H. 122.....	212
King v. Gatch, 1 Moody & Malkin, 222.....	227
King v. State, 12 Tex. Ct. App. 271.....	121
Kingsbury v. Kirwin, 42 N. Y. Super. 444.....	444
Kingsbury v. Case, 102 Mass. 222.....	22
Kinsay v. Statterly, 21 Iowa, 222.....	102
Kinsay v. Williams, 1 Cal. 121.....	276
Kipp v. Cannon, 22 Iowa, 222.....	122
Kirby v. Phoenix Ins. Co., 3 Lea, 122.....	224
Kirsch v. Heitman, 22 Ind. 217.....	172
Kirkpatrick v. Donnell, 22 Penn. 222.....	222
Kistler v. State, 22 Ind. 400.....	122
Klink v. Colby, 42 N. Y. 427; & C., 1 Am. Rep. 222.....	222, 224
Knapp v. Hoyt, 21 Iowa, 221; & C., 22 Am. Rep. 222.....	210
Knight v. Knight, 2 Barb. 122.....	224
Knight v. Plymouth, 2 Ark. 222.....	222
Kroeger v. Piquara, 121 Penn. 222; 22 Am. Rep. 212.....	22
Krug v. Shanks, 1 Leigh, 222.....	222
Kuehman v. Chicago, Clinton and Du- buque Railway, 22 Iowa, 222.....	22
Kyle v. Board, etc., 22 Ind. 112.....	222
Lafayette, etc., R. Co. v. Eberman, 22 Ind. 222.....	772
Lafayette, etc., R. Co. v. Olm, 22 Ind. 222.....	222
La Forge v. Jayne, 2 Penn. 222.....	222
Laine v. Calder, 2 Penn. 222.....	177, 222
Lake v. Calhoun, 22 Ala. 112.....	222
Lake Erie Ry. Co. v. Fitz, 22 Ind. 221; & C., 22 Am. Rep. 222.....	772
Lambar v. City of St. Louis, 15 Mo. 222.....	222
Lamberton v. Winslow, 22 Minn. 222.....	222
Langdon v. Applegate, 2 Ind. 222.....	222
Lapeyre v. Paul, 2 Mo. 222.....	222
Laska v. Holbrook, 2 Page, 222.....	222
Leavitt v. Peopie, 2 Bradw. (11) 127.....	212
Lawrence v. Montington Bank, 2 Com. 222.....	222
Lawrenceburgh etc. R. Co. v. Mont- gomery, 1 Ind. 474.....	721
Leater v. Wentcott, 22 N. Y. 122.....	222
Leather Cloth Co. v. Lescout, L. R., 2 By. Cas. 222.....	420
Lefferson v. East Boston Ferry Co., 11 Allen, 212.....	422
Ledyard v. Hibbard, 42 Mich. 421; & C., 22 Am. Rep. 424.....	422
Lee v. Gilm, 1 Bailey, 422; 21 Am. Dec. 472.....	422
Lee v. McLeod, 12 Nev. 222.....	122
Lee v. Ins. Co., 2 Gray, 222, 224.....	224
Leitch v. Com., 10 Grant 212.....	22
Leitch v. Hyde, 22 N. Y. 272.....	222
Leitch v. Smith, 42 Mo. 272.....	222
Leitch v. Pufferford, 12 Mass. 222.....	272
Leitch v. McNamara, 2 Iowa, 122.....	122
Leitch v. Clarke v. Courtney, 2 Pat. 122.....	122
Leitch v. Given, 2 Bush, 222.....	222
Lestrade v. Barch, 22 Cal. 222.....	222
Levi v. Bank, 2 Dill. 222.....	222
Lewis Adm'v. v. St. Louis and Iron Mountains R., 22 Mo. 222; & C., 21 Am. Rep. 222.....	422
Lewis v. Chapman, 22 N. Y. 222.....	222, 224
Lewis v. Eastern Railroad, 22 N. H. 127.....	212
Lewis v. Hartley, 1 Carr. & P. 422.....	222
Lewis v. McClure, 2 Oring. 222.....	222
Lewis v. McHale, 16 Ohio, 227.....	222
Lewis v. Smith, 22 Mass. 222.....	422
Lewis v. Spencer, 1 W. Va. 222; & C., 22 Am. Rep. 422.....	222, 224
Lewis v. St. Louis, etc., R. Co., 22 Mo. 222; & C., 21 Am. Rep. 222.....	422
Livorno Tax cases, 2 Wall 422.....	122
Livorno v. Hargood, 11 Mass. 222.....	222
Lindsay v. Com'rs, 2 Ray, 21.....	222
Lindsay v. Peopie, 22 N. Y. 122.....	222
Line v. Taylor, 2 Post. & Fin. 222.....	222
Linn v. Hering, 22 Ill. 122.....	22
Linton v. Hurley, 124 Mass. 222.....	422
Little v. Wilford, 21 Minn. 172.....	712, 714
Louisville R. v. Stuchins, 2 Bush, 1 422.....	422
Little Miami R. Co. v. Stevens, 20 Ohio, 412.....	422, 722
Livinston v. Arlington 22, Ala. 422.....	227
Livinston v. Trinity Church, 12 Vroom, 222.....	122
Lockwood v. Middlesex Assur. Co., 27 Conn. 222, 224.....	22
Loomis v. Hatfield, 21 N. Y. 222.....	222
Lopez v. Bell, 1 C. R. 272.....	222
Lopez v. Muelch, 21 Ill. 412.....	412
Lopez v. Holmden, 2 Or. 222.....	122
Long v. Barnes, 27 N. C. 222.....	222
Long v. Buchanan, 12 Md. 222.....	122
Long v. Morrison, 14 Ind. 222.....	222, 722
Long v. Stapp, 22 Mo. 222.....	122
Loomis v. Robinson, 22 Mo. 222.....	222
Lord v. Steamship Co. 102 U. S. 222.....	222
Lord Chynow's case, 2 Rep. 222.....	222
Loring v. Marsh, 2 Wall 222.....	122
Loring v. Sumner, 22 Pick. 222.....	222
Louterville, etc., Canal Co. v. Murphy, 2 Bush, 222.....	712
Love v. Harvey, 124 Mass. 222.....	222

TABLE OF CASES CITED.

XXV

PAGE.	PAGE.
Louisville and Nashville R. Co. v. Col- lins, 2 Duvall, 134.....	Matter of Jacobs, 2 N. Y. Crim. Rep. 286.....
Louisville, etc., R. Co. v. Kelly, 65 Ind. 571; s. c. 47 Am. Rep. 149.....	Matter of Karrigan, 20 N. J. L. 344.....
Louisville, etc., Ry. Co. v. Kriening, 67 Ind. 281.....	Matter of L. & W. Orphan Home, 65 N. Y. 116.....
Louisville, etc., Ry. Co. v. Richardson, 65 Ind. 45; s. c. 38 Am. Rep. 94.....	Matter of Pryor, 16 Kans. 75; s. c., 28 Am. Rep. 127.....
Love v. Watkins, 40 Cal. 548.....	Maxton v. Ghose, 75 Penn. St. 104.....
Lovett v. Salem, etc., R. Co., 6 Allen, 397.....	Maxton v. Morse, 3 Mass. 127.....
Lowber v. Mayor, etc., 6 Abb. Pr. 325.....	Maxwell v. Maxwell, 3 Fred. Bq. 25.....
Low v. Brown, 20 Ohio St. 409.....	Mayberry v. Chicago, etc., R. Co., 75 Mo. 422.....
Loyd v. McCaffrey, 46 Penn. St. 410.....	Mayhew v. Sullivan Mining Co., 70 Mo. 100.....
Lyle v. Barker, 3 Mun. 497; 7 Cow. Cal. s. c. 161.....	Maynard v. Morse, 25 Vt. 637.....
Lyon v. Culbertson, 65 Ill. 23; s. c., 25 Am. Rep. 349.....	Mayo v. Preston and Miami R. Co., 104 Mass. 127.....
Lynn v. Board, etc., 44 Ind. 294.....	McAfee v. Fowler, 24 N. Y. 314.....
Lynn v. Dorchester Mutual Fire Ins. Co., 105 Mass. 297; s. c., 7 Am. Rep. 625.....	McCarthy v. S. D. & P. M. R. Co., 61 N. Y. 173; s. c., 19 Am. Rep. 101.....
Lumb v. Beaumont, 20 W. R. 394.....	McCarthy v. Davies, 3 Vero 100; 20 Am. Dec. 223.....
Lunt v. Bank of North America, 40 Mich. 231.....	McCluskey v. Cyphert, 27 Penn. St. 250.....
	McConn v. N. Y. Cent. R. Co., 60 N. Y. 170.....
Macey v. Children, 3 Tenn. Ch. 449.....	McCutcheon v. Homer, 40 Mich. 420; s. c. 20 Am. Rep. 323.....
Machine Co. v. Gage, 100 U. S. 678.....	McDonald v. Trafton, 10 Mo. 225.....
Macomber v. Parker, 15 Pick. 174.....	McIlwain v. Bank of Wilmington, 1 Harring 299.....
Madrox v. Goddard, 13 Mo. 210.....	McIntosh v. Prouty, 9 Mete. 547.....
Maculay v. Fulton, 44 Cal. 575.....	McIntosh v. People's Nat. Fire Ins. Co., 54 Vt. 211; s. c., 41 Am. Rep. 243.....
Macular v. McKinley, 40 N. Y. Supr. & App. 543.....	McIntosh v. People, 104 Ill.; s. c., 44 Am. Rep. 67.....
Magill v. Cuts, 125 Mass. 565.....	McIntosh v. German Savings Bank As- sociation, 4 Mo. App. 220.....
Magway v. Hurt, 6 Ad. & El. 231.....	McIntosh v. Brown, 10 N. Y. 114.....
Maguire v. Middlesex Railroad, 114 Mass. 289.....	McIntosh v. Lord, 3 Wall 297.....
Maguire v. Smock, 43 Ind. 1; s. c., 13 Am. Rep. 275.....	McIntosh v. Spence, 31 N. Y. 310; s. c., 41 Am. Rep. 225.....
Mahady v. Bushwick R. Co., 91 N. Y. 145; s. c., 43 Am. Rep. 621.....	McIntosh v. Lee, 57 Iowa, 222.....
Mahan v. Brown, 13 Wood. 221.....	McIntosh v. Manoe, 11 Cush. 297.....
Makie v. Wilkinson, L. R., 6 Ex. 25.....	McIntosh v. Reader, 6 Watts, 24.....
Mallam v. May, 11 N. & W. 456.....	McIntosh v. Harbuck, 31 Miss. 277.....
Mallone v. Hathaway, 64 N. Y. 5; s. c., 21 Am. Rep. 513.....	McIntosh v. Crickett, 1 East, 103.....
Mandeville's case, 5 Cal. 227.....	McNair v. Platt, 46 Ill. 221.....
Mandle v. Bonington, etc., Savings Bank, 25 La. Ans. 415.....	McNaughton v. Caledonian R. Co., 10 Ct. of Sess. cas. 271.....
Manhattan Brass Co. v. Sears, 45 N. Y. 107.....	McNeil v. Truth Nat. Bank, 45 N. Y. 225; s. c., 7 Am. Rep. 241.....
Manning v. Gashar, 27 Ind. 200.....	McNellis Kara v. Reynolds, 9 Ala. 323.....
Mauzy v. Talmadge, 2 McLean, 170.....	McPherson v. State, 20 Ark. 225, 226.....
Mayer v. N. Y. & N. H. R. Co., 20 Conn. 227; s. c., 9 Am. Rep. 424.....	Mead v. McFadden, 25 Ind. 240.....
Mayberry v. Madison, 1 Cr. 127.....	Meador v. Parsons, 19 Cal. 204.....
May v. Putney, 25 N. H. 24.....	Mechanics Bank v. Bank of Columbia, 3 Wheat. 220.....
Marine Bank v. Fulton Bank.....	Mechanics Bank v. Kansas, 70 Mo. 565.....
Market Nat. Bank v. Pacific Nat. Bank.....	Mechanics Bank v. N. Y. & N. H. R. Co., 18 N. Y. 627.....
Mark v. Russell, 40 Penn. St. 373.....	Mechanics Bank v. Valley Packing Co., 70 Mo. 642.....
Marksbury v. Taylor, 10 Dugb. 519.....	McGuire v. Corwin, 3 MacArth. 61.....
Marquette, etc., R. Co., v. Taft, 20 Mich. 209.....	McGuire v. Corwin, 101 U. S. 109.....
Marshall v. Baltimore, etc., R. Co., 16 How 314.....	Melley v. Butler, 20 Ohio St. 250.....
Marshall v. Caldwell, 41 Cal. 611.....	Melendy v. Capen, 120 Mass. 229.....
Marshall v. Crutwell, L. R., 20 Bq. 222; 12 Musk Eng. Rep. 229.....	Memphis, etc., Co. v. McCool, 49 Ind. 223; s. c., 43 Am. Rep. 71.....
Martens v. Norton, 3 N. H. 206.....	Memphis v. Whitfield, 44 Miss. 420; s. c., 7 Am. Rep. 229.....
Martin v. Mechanics' Bank, 6 Harr. & Johns. 225.....	Menges v. Frick, 75 Penn. St. 127; s. c., 13 Am. Rep. 724.....
Martin v. Chicago, etc., R. Co., 20 Iowa, 426; s. c., 44 Am. Rep. 627.....	Meredith v. Andrea, 7 Fred. 5.....
Martin v. Robson, 45 Ill. 125; s. c., 10 Am. Rep. 579.....	Merchant's Nat. Bank v. Hall, 20 N. Y. 225; s. c., 20 Am. Rep. 425.....
Martin v. Sebastian, 4 Bibb, 425.....	Harris v. Worcester, 110 Mass. 216, 219; s. c., 16 Am. Rep. 222.....
Martinson v. N. Y. Cent. etc., R. Co., 24 N. Y. 227; s. c., 20 Am. Rep. 410.....	
Martin v. Smart, 41 N. H. 425, 440.....	
Matteson v. Chadwick, 71 Mo. 216.....	

	PAGE.		PAGE.
Merrill v. Ins. Co., 19 N. Y. 422; s. c., 29 Am. Rep. 784	294	Murray v. Railroad Co., 1 McM. 285	497
Methodist, etc., v. Fickett, 19 N. Y. 478	295	Mustard v. Wohlford & Heira, 15 Gratt. 329	295
Metropolitan Telephone and Telegraph Co. v. Caldwell Lead Co., 67 Haw. Fr. 305	18	Muster v. C. M. & St. P. Ry. Co.	41
Michigan Central R. Co. v. Coleman, 28 Mich. 440	708	Myers v. Meinrath, 101 Mass. 287; s. c., 8 Am. Rep. 168	39
Middlebrook v. State, 48 Conn. 200; s. c., 21 Am. Rep. 450	295, 296	Myers v. State, 93 Ind. 251	710
Middleton v. Percy & Hay, 538	440	N. E. Glass Co. v. Lovell, ubi supra	254
Miller, Ex parte, 90 N. C. 425	640	Nachtrieb v. Stoner, 1 Col. 408	273
Miller v. Eschschore, 68 Penn. St. 256	245	Nash v. Morley, 5 Beav. 177	295
Miller v. Kolb, 47 Ind. 129	420	Nash v. Spofford, 10 Met. 294; 42 Am. Dec. 425	37
Miller v. Mutual Benefit Ins. Co., 24 Iowa, 222	479	Nashville, etc., R. Co. v. Erwin, 3 Am. & Eng. R. Cas. 465	725
Miller v. Myers, 45 Cal. 539	108	National Bank of Newburgh v. Smith, 66 N. Y. 271, s. c. 23 Am. Rep. 48	120
Miller v. Phillips, 9 R. I. 142	299	Nave v. Flack, 90 Ind. 215, s. c., 44 Am. Rep. 335	440
Miller v. Rowan, 5 Ct. & F. 19; s. c., 2 Shaw. & McL. 385	299	Needham v. Allison, 24 N. H. 255	295
Miller v. State, 20 Ind. 297	152	Neel v. Neel, 19 Penn. St. 298	600, 602
Miller v. Teachout, 24 Ohio St. 222	144	Neel v. State, 4 Eng. 263	272
Millikin v. Shapleigh, 24 Mo. 209	295	Neesse v. Farmers' Ins. Co., 24 Iowa, 204	295
Mills v. City of Brooklyn, 20 N. Y. 420	290	Nelson v. Brown, 44 Iowa, 405; 24 Id. 555	420
Mills v. Catlin, 23 Vt. 107	245	Nelson v. Clay Heira, 7 J. J. Marsh. 139	697
Mills v. Mills, 40 N. Y. 542	751	Nelson v. Harwood, 3 Call. 245	37
Milne v. Lelsler, 7 H. & R. 785, 786	502	Nelson v. Merriam, 4 Pick. 240	245
Milnes v. Gary, 14 Vesey, Jr. 490	185, 187	Nelson v. Stewart, 54 Ala. 115; s. c., 25 Am. Rep. 660	220
Mina v. Swartz, 27 Tex. 12	205	Nelson v. Wood, 62 Ala. 175	205
Mitchell v. Western, etc., R. Co., 20 Ga. 22	708	Nettleton v. Sikes, 8 Met. 24	125
Mobile v. Kimball, 122 U. S. 708	295	Nudd v. Burrows, 91 U. S. 422	605
Monroe v. Douglass, 5 N. Y. 447	205	Newman v. Third Ave. R. Co., 80 Super. Ct. Rep. 412	720
Montgomery v. Insurance Co., 14 Bush, 51	124, 125	New Albany, etc., R. Co. v. Haskell, 11 Ind. 303	717
Montgomery v. Kellogg, 42 Miss. 466	209	Newell v. Commonwealth, 2 Wash. (Va.) 84	702, 704
Montgomery, etc., R. Co. v. White, 85 Penn. St. 297	177	New Haven Co. Bank v. Mitchell, 15 Conn. 205	205
Moody v. State, 45 Ala. 115	205	New Jersey Railroad v. Kennard, 21 Penn. St. 233	295
Moon's Admr. v. Richmond, etc., R. Co., 3 Va. L. J. 84	405	Newton v. Com., 1 Grant Cas. 425	295
Moore v. Griffin, 25 Me. 220	297	Newton v. Seaman's Friend Society, 130 Mass. 91, s. c. 30 Am. Rep. 425	452
Moore v. Whitaker, 2 Harr. 80	644	Nichols v. Bastard & Cr. M. & R. 450, 460	5
Moran's case, 44 Md. 295	295	Nichols v. Sixth Ave. Railroad, 25 N. Y. 131	29
Morgan v. Beaumont, 121 Mass. 7	215	Nichols v. Suncok Mfg. Co., 24 N. H. 345, 349	212, 213
Morgan v. Smith, 39 Ala. 225	48	Nichols v. Stratton, 10 Q. B. 245	420
Morgan v. Stearns, 41 Vt. 297	295	Noble v. City of Vincennes, 43 Ind. 125	417
Morice v. Bishop of Durham, 9 Ves. 299; 10 Id. 522	295	Noblesville, etc., G. R. Co. v. Gause, 76 Ind. 142, s. c. 40 Am. Rep. 294	704
Morris v. Davidson, 67 Ga. 251	205	Nolan v. Mayor & Yerg. 185	720
Morris v. Hall, 41 Ala. 515	45	Norden v. Western R. Co., 15 N. Y. 444	541
Morris Run Coal Co. v. Barclay Coal Co., 85 Penn. St. 174; s. c., 3 Am. Rep. 150	125	Norfolk, etc., R. Co. v. Ormsby, 27 Gratt. 455	717
Morrison v. Bank of Commerce, 51 Ind. 295	725	Norris v. Jackson, 3 Cliff. 200	160
Morrison v. McDonald, 21 Me. 220	295	Northern Cent. Ry. Co. v. State, 29 Md. 420	725
Morrison v. Sheer, 10 Gratt. 295	294	Norton v. Shepard, 48 Conn. 163; s. c., 40 Am. Rep. 157	245
Morse v. Hutchins, 104 Mass. 429	25	North Penn. R. Co. v. Mahoney, 57 Penn. St. 157	717
Morse v. Morse, 58 N. H. 391	297	Norton v. Beaver, 5 Ohio, 178	725
Morton v. Quinn, 45 Vt. 145	220	Nowlin v. Whipple, 79 Ind. 481	150
Moses v. Franklin Bk., 24 Md. 580	299	Noves v. Nichols, 28 Vt. 178	209, 210
Motley v. Sargent, 119 Mass. 251	212	Noves v. Spaulding, 27 Vt. 420	444
Mud River and L. E. R. v. Barber, 5 Ohio, 541	295	O'Connell's case, 20 Md. 212	420
Muirhead v. Kirkpatrick, 21 Penn. St. 297	294	O'Connor v. Bryant, 121 Mass. 257	212
Mulhade v. Railroad Co., 20 N. Y. 270	725	Odessa v. Barry, 24 Miss. 2	700
Mulhern v. McDavitt, 16 Gray, 404	202	Ogby v. Crawford County, 7 Fed. Rep. 745	120, 122
Mullen v. Philadelphia and Southern R. Co., 73 Penn. 25; s. c., 21 Am. Rep. 2	404		
Munn v. Burch, 25 Ill. 25	294, 295		
Munn v. Illinois, 24 U. S. 113	31, 101		
Munson v. Hungerford, 6 Barb. 295	595		
Munson v. Munson, 25 Conn. 595	297		
Murphy v. Copeland, 51 Iowa, 515	212		
Murphy v. Hendricks, 57 Ind. 295	205		
Murray v. Haverly, 70 Ill. 200	601		

TABLE OF CASES CITED.

xxvii

	PAGE.		PAGE.
O'Harrow v. Whitney, 85 Ind. 140.....	403	Penn. R. Co v. Price, 95 Penn. St. 388.	541
Ohio, etc., Ry. Co. v. Collins, 78 Ind.	753	Penn. R. Co v. White, 85 Penn. St. 387	177
391; s. c., 85 Am. Rep. 124	708		179
Old v. Commonwealth, 18 Gratt. 916..	704	Pennsylvania Salt Manuf. Co v. Neal,	116
O'Neill v. Kittredge, 25 Mass. (3 Allen),	470	54 Penn. St. 9	116
Ontario Bank v. Ontario Bank, 31 N. Y.	480	Pennsylvania Telegraph v. Western Union	208
Ormerod v. Dearman, 100 Penn. St. 563;	559	Telegraph, 95 U. S. 1	212
s. c., 45 Am. Rep. 391	751	People v. Ah Fook, 64 Cal. 340.....	704
Osborne v. United States, 91 U. S. 474.	579	People v. Allen, 42 N. Y. 378	217
Oswanyon v. Arms Co., 108 U. S. 361.	750	People v. Arguello, 37 Cal. 594	420
Oxley v. Watts, 1 T. R. 13.....	843	People v. Bowen, 43 Cal. 430; s. c., 18	216
Otis v. Gaslin, 81 Me. 586	812	Am. Rep. 148	216
Owby v. Jones, 73 N. Y. 631	440	People v. Brady, 58 N. Y. 182	68
Owens v. Marshall, 33 Md. 300	256	People v. Brundage, 78 N. Y. 400	607
Owen v. New York Central Railroad	308	People v. Bruce, 7 Cow. 429	217
Co., 1 Lane 106	308	People v. Callahan 80 How. 378	218
Owby v. M. & W. P. R. Co., 37 Ala.	380	People v. Callahan, 23 Hun, 579; s. c.,	217
Owen v. Phillips, 78 Ind. 384	739	60 How. Pr. 372	217
P. W. & B. R. Co. v. Quigley, 31 How.	310	People v. Carney, 29 Hun, 47	191
Pac. So. Guano Co. v. Mullen, 60 Ala.	348	People v. Chee Kee, 61 Cal. 404.....	206
Pacific R. Co. v. Thomas, 19 Kane. 398..	755	People v. Cook & Mich. 239	182
Packard v. Richardson, 17 Mass. 129,	129	People v. Crossley 69 Ill. 196	120
Page v. Page, 51 Mich. 88	710	People v. D'Arcencour, 32 Hun, 179	219
Palge v. Hazard, 5 Hill, 606.	561	People v. Dohring, 2 T. & C. 458	544
Palme v. Schoenstadt Ins. Co., 11 R. I.	411	People v. Gardner, 45 N. Y. 819	553
Pangburn v. Patridge, 7 Johns. 149.....	519	People v. Genet 59 N. Y. 80; s. c., 17	41
Pannell v. Commonwealth, 85 Penn. St.	380	Am. Rep. 215	41
Parker v. Canfield, 37 Conn. 369	256	People v. Hart 24 How. Pr. 289	207
Parker v. Hubble, 78 Ind. 500.....	406	People v. Kalloch, 60 Cal. 113	704
Parker v. The Proprietors, etc., 3 Met.	101	People v. Kerr 27 N. Y. 188	18
Parker v. Taswell, 3 DeG. & J. 509.....	168	People v. Luckwood, 1 Hun, 304.....	512
Parsons v. Camp, 11 Conn. 895	186	People v. Mauke, 78 N. Y. 611.....	554
Parsons v. Parsons, 1 Ven. Jr. 366.....	322	People v. Metropolitan Telephone &	19
Parsons v. State, 28 Ala. 30	62	Telegraph Co. 31 Hun 596	19
Parramore's case, 3 Yeates, 441.	207	People v. Nevins, 1 Hill, 154	202
Patterson v. Lawrence, 90 Ill. 176; s. c.,	87	People v. Niles 35 Cal. 262	166
25 Am. Rep. 281	87	People v. Pacheco, 27 Cal. 173.....	434
Patterson v. Pittsburg and Connellsville	404	People v. Potter 35 Cal. 110	202
Railroad, 78 Penn. St. 309; s. c., 18	404	People v. Parley, 2 Cal. 564	702
Am. Rep. 412.....	404	People v. Redinger, 55 Cal. 200; s. c.,	6
Patterson v. State, 13 Tex. Ct. App.	301	36 Am. Rep. 32	6
Patterson v. Ford, 3 Gratt. 24.	306	People v. Snyder, 41 N. Y. 307	201, 205
Patterson v. Pittsburg and Connellsville	406	People v. Twaddell, 18 Hun, 437	190
Railroad, 78 Penn. St. 309; s. c., 18	406	People v. Utica Ins. Co., 15 Johns. 308,	607
Am. Rep. 412	406		607
Pea v. Pea, 35 Ind. 397	164	People v. Widows Insurance Co. 15	194
Peabody v. Speyers, 60 N. Y. 290.	445	Hun. 8	194
Pearce v. Langit, 47 Am. Rep. 737.....	202	People v. Wilson, 64 Ill. 195	200, 206
Pearle v. Covillaud, 6 Cal. 617	602	People v. Yates, 6 Johns. 337	200
Peck v. Barney, 18 Vt. 95	200	Perin v. Corey, 24 How. 465	144
Peck v. Denniston, 131 Mass. 17.....	212	Perkins v. Stevens, 24 Pick. 277	223
Pierce v. Buley, 5 Ind. 69	760	Perkins v. Mathes 49 N. H. 107, 110	207
Pell v. Molloy, 28 Cal. 273.....	106	Perry v. N. O. R. Co. 55 Ala. 414.....	207
Peltz v. Nichols, 63 Mo. 171	480	Persan v. Grier, 86 N. Y. 124; s. c., 20	609
Penn. R. Co v. Weaver, 76 Penn. St.	622	Am. Rep. 35	609
157; s. c., 18 Am. Rep. 407	622	Pettie v. Howe, 4 Thomp. & Cook, 25 ..	191
Pennsylvania Co. v. Gallagher, 60 Ohio	763	Pervear v. Com. 5 Wall. 475	190
St. 657; s. c., 48 Am. Rep. 679	763	Phelps v. Rolhus, 40 Conn. 230.....	456
Pennsylvania Co. v. Hensel, 70 Ind. 300;	179	Phenix Ins. Co. v. Church, 31 N. Y.	208
s. c., 28 Am. Rep. 186.....	179	218, 227; s. c., 35 Am. Rep. 484	208
Pennsylvania Co. v. Hoagland, 76 Ind.	173	Philadelphia etc. R. Co v. Anderson,	173
308	173	94 Penn. St. 341 s. c. 35 Am. Rep. 737	173
Pennsylvania Co. v. Sinclair, 65 Ind.	763	Philadelphia etc. R. Co v. Darby, 14	784
301	763	How. 468	784
Penn. Ins. Co v. Crane, 134 Mass. 50;	26	Philadelphia etc. R. Co v. Lehman,	204
s. c., 48 Am. Rep. 298.....	26	6 Md. 38	204
		Philadelphia, etc. R. Co v. Stebbing,	606
		87 Md. 504	606
		Phillips v. Astling 3 Taunt. 206	200
		Phillips v. Wickham 1 Paige, 300	120
		Phlips v. Ives 1 Rawle 36	572
		Phillips v. Freeman 5 How. Pr. 378 ..	2
		Phillips v. Town of Albany 28 Wis. 340.	207
		Pickard v. Collins 21 Barb. 444	753
		Pickering v. Cense 79 Ill. 128	445
		Pickering v. Shotwell 10 Penn. St. 23	144
		Pico v. Calumet 2 Cal. 414	600, 606
		Piedmont & Arlington Ins. Co. v.	
		Young, 58 Ala. 476; s. c. 29 Am. Rep.	56
		770	56

PAGE.	PAGE.
Pierce v. Nashua Ins. Co., 30 N. H. 207, s. c. 9 Am. Rep. 205..... 20	R. Co. v. Anderson, 31 Gratt. 512; s. c. 21 Am. Rep. 750..... 206
Pierce v. Pass 1 Port (Ala.), 200..... 150	Railroad Co. v. Aspell, 23 Penn. St. 147. 177
Pierce v. Tuttle, 53 Barb. 167..... 664	Railroad v. Beale, 73 Penn. St. 504; s. c. 13 Am. Rep. 753..... 666
Piper v. Trus, 35 Cal. 506..... 440	Railroad v. Crawford, 24 Ohio St. 601; s. c. 15 Am. Rep. 523..... 666
Pitts v. State, 43 Miss. 472, 480..... 486	Railroad Company v. Fort, 11 Wall. 523. 404
Pittsburgh H. v. Andrews, 20 Md. 320; s. c. 17 Am. Rep. 509..... 303	Railroad v. Garrett, 8 Lon. 428; s. c. 41 Am. Rep. 640..... 666
Pittsburgh, etc. Ry. Co. v. Caldwell, 74 Penn. St. 421..... 785	Railroad v. Hellman, 40 Penn. St. 60..... 666
Pittsburgh and Connellsville R. Co. v. Bentmeyer, 12 Penn. St. 278, s. c. 37 Am. Rep. 684..... 30	Railroad Company v. Hope, 20 Penn. St. 373, s. c. 21 Am. Rep. 100..... 666
Pittsburgh R. v. McCleery, 58 Penn. St. 304..... 301, 303	Railroad Company v. Houston, 95 U. S. 697..... 667
Pittsburgh, etc. R. Co. v. Pillow, 70 Penn. St. 510, s. c. 18 Am. Rep. 494..... 178	Railroad Company v. Husen, 95 U. S. 465..... 200, 207
Pittsburgh, etc. Ry. Co. v. Ruby, 30 Ind. 534, s. c. 10 Am. Rep. 111..... 773	Railway Company v. Keary, 3 Ohio St. 301..... 413, 730
Pittsburgh, etc. R. Co. v. Spencer, 60 Ind. 280..... 781	Railroad Company v. Kerr, 60 Penn. St. 351, s. c. 1 Am. Rep. 431..... 666
Pittsburgh, etc. R. Co. v. Theobald, 51 Ind. 346..... 785	Railway v. Lavalley, 36 Ohio St. 201..... 730
Pittsburgh, etc. R. Co. v. Williams, 74 Ind. 423..... 170, 426	Raworth v. Marriott, 2 Eng. Ch. 914..... 207
Pitzer v. Russell, 4 Oreg. 124..... 400, 406	Railroad Co. v. Richmond, 10 Wall. 529..... 200, 201
Pixley v. Boynton, 79 Ill. 351..... 444	Railroad v. Ross, 112 U. S. 377..... 400
Plant v. Taylor, 7 Hurl. & Nov. 207..... 616	Railroad Co. v. Thul, 29 Kans. 406; s. c. 44 Am. Rep. 650..... 730
Plath v. Ins. Co., 23 Minn. 479..... 224	Railroad Co. v. Walrath, 36 Ohio St. 441, s. c. 43 Am. Rep. 423..... 178
Plumer v. Plumer, 20 N. H. 508..... 203	Hamden v. Boston & Albany R. Co., 104 Mass. 117, s. c. 8 Am. Rep. 300..... 200
Polack v. Ploche, 35 Cal. 423..... 112	Rankin v. New Eng. etc. Silver Mining Co. 4 Nev. 78..... 774
Pollett v. Long, 58 N. Y. 200..... 175	Rape v. Heaton, 9 Wis. 323, 341..... 204
Pond v. Cummins, 50 Conn. 372..... 265	Rapp v. Matthias, 35 Ind. 333..... 406
Pope v. Pope, 10 N. H. 1..... 204	Ray v. Simmons, 11 R. I. 205; s. c. 20 Am. Rep. 447..... 207
Porter v. Bradley, 7 R. I. 538..... 250	Reed v. Sprague, 34 Ala. 101..... 661
Porter v. McClure, 15 Wend. 197..... 255	Reed v. Spaulding, 42 N. H. 119..... 667
Porter v. Waring, 60 N. Y. 250..... 206, 202	Reed v. State, 8 Ind. 200..... 666
Porter v. H. H. 3 Tex. 428..... 104	Reed v. Taylor, 5 Barn. & Adol. 675..... 106
Post v. Pearsall, 22 Wend. 425..... 626	Reg v. Gray, 4 Post & Fin. 70..... 730
Powell v. City of Madison, 21 Ind. 205..... 158	Rehberg v. Mayor etc., 91 N. Y. 143; s. c. 43 Am. Rep. 657..... 666
Powers v. Bunnarat, 12 Ohio St. 373..... 203	Rehden v. Wesley, 29 Nev. 213..... 745
Prager v. Bristol etc. Ry. Co., 24 L. T. (N. S.) 106..... 177	Respieth v. Oswald, 1 Dal. 519..... 206
Pray v. Mayor, etc., 20 N. J. L. 504..... 404	Rex v. Ford, 2 Balk. 690..... 200
Prell v. McDonald, 12 Am. Rep. 400..... 202	Rex v. Gill Russ & R. 431..... 206
Presbury v. Old Colony and Newport Railway, 103 Mass. 1, 4, 7..... 20	Rex v. Grieppe, 1 Ld. Raym. 256; 3 Rao. Abr. 487..... 200
Prescott v. Nevers, 4 Mass. 200..... 104	Rex v. Mason, 11 Leach (4th ed.) 407, 301, 493, 2 Hawk P. C. ch. 25, § 50..... 200
President, etc. v. City of Indianapolis, 18 Ind. 620..... 734	Rex v. May, 1 Doug. 193..... 200
Priddle v. Kent, 10 Ind. 205..... 400	Rex v. Cross, 2 C. & P. 483..... 20
Price v. Mallott, 55 Ind. 206..... 154	Rex v. Dixon, 10 Mod. 328..... 200
Prudeau v. City of Mineral Point, 48 Wis. 413; s. c. 25 Am. Rep. 505..... 601	Rex v. Pease, 4 H. & Ad. 80; Sedw. 32, & Const. Law, 45, 46..... 20
Pringle v. Dunkley, 14 S. & M. 16; 21 Am. Dec. 110..... 403	Rex v. Pippett, 1 T. R. 225..... 200
Pritchett v. Insurance Company, 3 Yeates, 458..... 571	Rex v. Poulton, 2 Camp. 230..... 700
Pruner v. Pendleton, 75 Va. 516; s. c. 40 Am. Rep. 708..... 730	Rex v. Plympton, 2 Ld. Raym. 1277..... 700
Pull v. McDonald, 7 Kans. 426..... 202	Rex v. Rogler, 1 H. & C. 272..... 200
Pullen v. Bell, 40 Me. 314..... 166	Rex v. Vaughan, 4 Burr. 3424..... 700
Pullman, etc. Co. v. Barker, 4 Col. 344; s. c. 34 Am. Rep. 68..... 173, 175	R. v. Walter, 3 Esp. 21..... 207
Pulse v. Miller, 31 Ind. 190..... 451	Rice v. Mead, 22 How. Pr. 445..... 204
Putnam v. Broadway, etc., R. Co., 63 N. Y. 113..... 641, 643, 543	Rice v. Montgomery, 4 Blas. 75..... 202, 207
Putnam v. Wiles, 1 Hill, 204..... 205	Rice v. Society, 50 N. H. 191, 197..... 207
Quarrier v. Ins. Co., 10 W. Va. 307; s. c. 37 Am. Rep. 520..... 204	Rice v. Tower, 1 Gray 426..... 20
Queen v. Dealey, 11 Cox. C. C. 607..... 601	Rice v. Flanders, 30 N. H. 225..... 207
Queen v. Payne, L. R. 1 C. C. 348..... 601	Richardson v. Smith, 1 Ch. App. 643..... 168
Queen v. Thompson, L. R. 1 C. C. 378..... 601	Richeson v. Shinn, 47 Mo. 50..... 67, 90
Queen v. Winsor, L. R. 1 Q. B. 300..... 601	Ricker v. Snyder, 9 Wend. 416..... 248
Rae v. Hulbert, 17 Ill. 372, 373..... 204	Rickets v. Hitt hens, 34 Ind. 240..... 701

TABLE OF CASES CITED.

xxix

Roberts v. Johnson, 20 N. Y. 612.....	770	Sawyer v. Tappan, 14 Bush, 707	444
Roberts v. Marley, 60 Ind. 125	320	Sawyer v. Tolan, 20 N. H. 445.....	500
Roberts v. Ogdensburgh, etc., R. Co.,	180	Sealy's case, 37 Md. 800	470
20 Bus. 154	180	Seaman v. Union Ins. Co., 4 Biss. 621.	91
Roberts v. Ogdensburgh and Lake			20
Champlain R. Co., 20 Bus. 155	770	Scheffer v. Railroad, 105 U. S. 240	775
Robertson v. Bullions, 9 Barb. 204.....	240	Schlicht v. State, 55 Ind. 173, 174.....	770
Robertson v. Bullions, 9 Barb. 204.....	400	Schlomer v. State, 55 Ind. 20	770
Robertson v. M. Y., etc., R. Co., 20	400	Schroeder v. C., R. I. & P. R. Co., 47	
Barb. 21	770	Iowa, 575	770
Robertson v. Wyden, 2 Men. & Rob. 101.	770	Schuyler v. Smith, 61 N. Y. 314, s. c.	
Robins v. Ward, 111 Mass. 244	95	10 Am. Rep. 670	770
Robinson v. Pritchburg & W. R. Co., 7		Scott Co. v. City of Davenport, 24 Iowa,	
Gray 92	610	300	404
Robinson v. Flanders, 20 Ind. 10	60	Scott v. Loudon, etc., Co., 2 H. & C.	
Robinson v. N. Y. Cent. etc., R. Co.,		300	170
40 N. Y. 11, s. c. 21 Am. Rep. 1	770	Scott v. Ocean Bank, 23 N. Y. 200.....	200
Robinson v. Ryan, 25 N. Y. 324	630	Scraps v. Kelly 24 Mich. 10	500
Robinson v. Lyle, 10 Barb. 512	3	Sedgwick v. Garding 55 Ga. 204	245
Robinson v. North Eastern Ry. Co., L.		Sims v. City of Frankfurt 70 Ind. 448	770
R. 10 Q. R. 21 12 Eng. Rep. 200.....	170	Settle v. Van Euren, 40 N. Y. 200	601
Roch v. Rymond, 105 Mass. 421	200	Seaton v. Newton 17 Hun. 30	600
Rodgers v. Rodgers 7 Watts 15	400	Seaton v. Graham, 5 Iowa, 181	400
Roe v. Day, 7 Carr. & P. 40	610	Shackelford v. Ward 3 Ala. 47	610
Rogers v. Abbott 7 Ind. 134	400	Shannon v. Frost, 2 B. Mon. 202, 203, 202.	400
Rogers v. Smith 4 Penn. 81	135		
Rogers v. State 11 Tex. 17 App. 600.....	100	Share v. Anderson, 18. & R. 45; 10 Am.	
Roth v. Wilson 1 H. & Ald. 50	5	Dec. 471.	90
Ross v. Harley 20 Ind. 7	607	Shattuck v. Myers, 18 Ind. 48.	770
Ross v. Litchaw, 50 Penn. 81	110	Shaw v. Crawford, 10 Johns. 200	200
Rosenthal v. Mayhugh 13 Ohio 115	67	Shaw v. Kaier, 100 Mass. 440	6
Ross v. Russell 60 Ind. 25	770	Shaw v. State, 24 Ind. 100	207
Ross v. Faust, 21 Am. Rep. 455	200	Shaw v. Van Rensselaer, 60 How. Pr.	
Rounds v. Delaware, etc., R. Co., 24		140	770
N. Y. 120, s. c. 21 Am. Rep. 274	770	Shaw v. Williams, 57 Ind. 110; s. c., 44	
Rouillon v. Rouillon, L. R. 14 Ch.		Am. Rep. 134	770
Div. 21; s. c. 25 Am. Rep. 200	600	Shaw v. Sixth Ave. R. Co., 60 N. Y. 100;	
Rowell v. Railroad	610	s. c. 20 Am. Rep. 400	770
Rouland v. First School District of		Shed v. Augustine, 14 Kans. 200	200
Wesley	200	Shelly v. ———, 10 Ves. 60	140
Routh v. Howell 8 Ven. 205	743	Shepard v. Parker, 20 N. Y. 517	517
Roster v. Steelman, 73 Ind. 208.....	200	Shepherd v. People, 25 N. Y. 406	200
Rudolf v. Winters, 7 Neb. 125, 126, 410.	447	Shapler v. Scott, 60 Penn. 84	110
Rumsey v. Berry, 65 Mo. 670	444	Sheridan v. Madors, 10 N. J. Eq. 400	200
Rumsey v. Durham, 5 Ind. 71	400	Sherlock v. Allier, 20 U. S. 99	101
Russ v. Life Insurance Co., 20 N. Y.		Sherlock v. Allier, 44 Ind. 104.....	170
513	670	Sherman v. Com., 14 Gratt. 677	67
Rush v. Vought, 45 Penn. 81. 407.....	200	Sherwood v. Meadow Valley Mining Co.,	
Rush County v. Stubbs, 15 Kans. 200	714	60 Cal. 412	707
Rushing v. People, 60 Ark. 200	200	Sherman v. Milwaukee, Lake Shore and	
Russell v. Richards, 10 Mo. 420; 25 Am.		Western Railroad, 40 Wis. 645	15
Dec. 204	100	Sherman v. Rochester and Syracuse R.	
Rutherford v. Holmes, 5 Hun, 617 200	200	Co., 17 N. Y. 100	200
	304	Shiels v. Starks, 14 Ga. 420	617
Ryan v. Chicago and N. W. R. Co., 60		Shinner v. Gordon, 13 East. 204	6
Ill. 171; s. c., 14 Am. Rep. 50	604	Shipner v. Henderson 14 Johns. 170	310
Ryan v. New York, etc., R. Co., 25 N.		Shurlock v. Stevens, 61 Vt. 514; s. c., 21	
Y. 210	170	Am. Rep. 400	214
Ryno v. Ryno, 21 N. J. Eq. 200	200	Sims v. Everhardt, 102 U. S. 610	700
		Sitgreaves v. Bank, 40 Penn. 81 200	100
S. & N. R. Co. v. Chappell, 61 Ala. 207.	601	Slaughterhouse case, 16 Wall. 20	200
Shattuck v. City of New Albany, 60 Ind.		Slomer v. People, 25 Ill. 70.	570
472; s. c., 45 Am. Rep. 407	417, 418,	Smallman v. Onions, 3 Brown. Ch. 621.	600
	400	Snice v. Dryer, 6 Moore P. C. C. 404	405
Shelton v. McDonald, 10 Johns. 200	200	Smith v. Bishop, 9 Vt. 110, 21 Am. Dec.	
Shelton v. Adler, 3 Robt. 704	600	607	670
Shelton v. Hoffman, 2 Cal. 100	600	Smith v. Dunn, 6 Hill, 340	200
Shelton v. Sanders, 11 Allen, 400, 144.	200	Smith v. Flint, etc., R. Co., 45 Mich.	
Shelton v. Shaw, 101 Mass. 145; s. c.,		507	204
1 Am. Rep. 227.	640	Smith v. Mumford, 9 Cow. 20.	400
San Francisco, etc., R. Co. v. State		Smith v. Oshorn, 50 Iowa, 474.....	200
Board, 60 Cal. 12.....	100	Smith v. Stevens, 25 Ill. 204	200
Sarahans v. Armstrong, 10 Kans. 100	207	Smith v. State 62 Tex. 440	100
Sargent v. Parsons, 10 Mass. 140	607	Smith v. Tallapocan Co., 2 Woods, 574.	200
Sauer v. New York, etc., R. R. Co., 65		Smith v. United States, 24 U. S. 97.....	60
N. Y. 20; s. c. 20 Am. Rep. 10	170	Smith v. Yargan, 60 Ind. 445; s. c., 25	
Savage v. Howard Ins. Co., 60 N. Y.		Am. Rep. 200	700
400, 405; s. c., 11 Am. Rep. 761	31	Smith v. Yale, 31 Cal. 104.....	100
		Smelling v. Watrons, 2 Polg. 214.....	600

TABLE OF CASES CITED.

	PAGE.		PAGE.
<i>Snow v. Pitchburg R. Co.</i> , ante.	640	<i>State v. Hinchman</i> , 27 Penn. St. 477.	288
<i>Snow v. Houstonian R. Co.</i> , 3 Allen, 441.	420	<i>State v. Hughes</i> , 60 Tex. 618.	702, 703
<i>Snow v. Schmecker Mfg. Co.</i> , 60 Ala. 111.	300	<i>State v. Ivy</i> , 25 Tex. 645.	196
<i>Snowden v. Wilna</i> , 19 Ind. 10.	122	<i>Strut v. Jackson</i> , 3 Sand. 228.	267
<i>Society for propagating the Gospel v. Town of Pawlet</i> , 4 Pet. 601, 604, 606.	125	<i>State v. Jenkins</i> , 22 Kans. 477.	294
<i>Spicer v. Romanet</i> , 22 Tex. 220.	292	<i>State v. Johnson</i> , 24 Miss. 216.	297
<i>Southgate v. Atlanta, etc., R. Co.</i> , 61 Mo. 89.	179	<i>State v. Johnson</i> , 48 Ind. 107.	710
<i>South, etc., R. Co. v. Pilgrimage</i> , 60 Ala. 220.	320	<i>State v. Jones</i> , 51 Mo. 125.	611
<i>Southern Pacific Railroad v. Reed</i> , 41 Cal. 226.	15	<i>State v. Latham</i> , 60 N. C. 214; s. c., 12 Am. Rep. 645.	102
<i>Southwestern R. Co. v. Wright</i> , 60 Ga. 311.	290	<i>State v. Louisville, etc., R. Co.</i> , 60 Ind. 114.	709
<i>Sowers v. Cyranus</i> , 20 Ohio St. 39; s. c., 45 Am. Rep. 418.	304	<i>State v. M. & I. Railroad</i> , 22 N. H. 222.	616
<i>Sowers v. Dehon</i> , 3 Miss. 29.	341	<i>State v. Main</i> , 4 Iowa 240.	610
<i>Spargo's case</i> , L. R., 3 Ch. App. 407; 5 Eng. R. 422.	316	<i>State v. Matthews</i> , 5 N. H. 450.	295
<i>Spaulding v. People</i> , 7 Hill. 211.	264	<i>State v. May Locke</i> , 7 Oreg. 54.	296
<i>Spicer v. Bishop</i> , 24 Ohio St. 603.	451	<i>State v. Mayor etc.</i> , 11 Humph. 217.	297
<i>Spencer v. Railroad</i> , 17 Wis. 407.	293	<i>State v. McCune</i> , 15 Cal. 429.	601
<i>Spicer v. Hoop</i> , 51 Ind. 225.	704	<i>State v. Mead</i> , 4 Bush. 49.	602
<i>Spencer v. Brooklyn City R. Co.</i> , 54 N. Y. 230.	175	<i>State v. Melvin</i> , 4 Blackf. 209.	603
<i>Burgess v. Scholbie</i> , 48 Ind. 216.	470, 475	<i>State v. Merrill</i> , 73 Mo. 278.	298
<i>Standard Oil Company v. Bagholder</i> , 20 Ind. 1.	187, 189, 190	<i>State v. Merrill</i> , 16 Ark. 224.	299
<i>State Tax case</i> , 15 Wall. 204.	161, 225	<i>State v. Morris etc.</i> , R. Co. 22 N. J. L. 487.	294
<i>State Tax case</i> , 20 U. S. 578.	229	<i>State v. Rector</i> , 45 N. J. L. 220.	409
<i>State v. Adams</i> , 17 Tex. 220.	705	<i>State v. Romano</i> , 20 Iowa, 46.	147
<i>State v. Adams</i> , 65 N. C. 227.	645	<i>State v. Parham</i> , 5 Jones, 416.	216
<i>State v. Ab Chey</i> , 14 Nov. 70; s. c., 20 Am. Rep. 100.	191	<i>State v. Pettaway</i> , 3 Hawth. 622.	149
<i>State v. Anderson</i> , 40 Iowa, 207.	292	<i>State v. Pierce</i> , 45 N. H. 378.	299
<i>State v. Bailey</i> , 31 N. H. 222.	292	<i>State v. Pinckney</i> , 10 Rich. (Low) 411.	181
<i>State v. Bailey</i> , 31 N. H. 225.	292	<i>State v. Powell</i> , 67 Mo. 265.	224
<i>State v. Baptiste</i> , 20 La. Ann. 184.	76	<i>State v. Purse</i> , 4 McQuid, 419.	712, 713
<i>State v. Berdette</i> , 73 Ind. 125, 126; s. c., 20 Am. Rep. 127.	473	<i>State v. Rippoc</i> , 3 Bay. 59.	60
<i>State v. Bond</i> , 4 Jones Law, 9.	207	<i>Story v. Salomon</i> , 71 N. Y. 460.	405
<i>State v. Bonham</i> , 15 Ind. 220.	116	<i>Stakes v. Saltonstall</i> , 12 Pet. 129.	177, 178
<i>State v. Boon</i> , Taylor, 100.	600	<i>State v. Sanders</i> , 48 Mo. 222; s. c., 20 Am. Rep. 722.	192
<i>State v. Boscowen</i> , 20 N. H. 217.	612	<i>State v. Saunders</i> , 20 Iowa, 222.	410
<i>State v. Brien</i> , 3 Vroom, 414.	608	<i>State v. Sawinist</i> , 24 La. Ann. 110.	293
<i>State v. Broadway</i> , 20 N. C. 411.	140	<i>State v. Schlemm</i> , 4 Harring. 677.	60
<i>State v. Burnham</i> , 24 Vt. 445; s. c., 45 Am. Rep. 301.	722	<i>State v. Sims</i> , 20 W. Va. 12.	60
<i>State v. Caldwell</i> , 3 Baxt. 579.	210	<i>State v. Sloss</i> , 25 Mo. 221.	295
<i>State v. Carrigan</i> , 20 N. J. L. 50.	187	<i>State v. Smith</i> , 24 Iowa, 104; s. c., 27 Am. Rep. 101.	130
<i>State v. Connors</i> , 20 W. Va. 1.	61	<i>State v. Smith</i> , 44 Ind. 507.	473
<i>State v. Copp</i> , 15 N. H. 212.	202	<i>State v. Smith</i> , 1 Bail. 299.	605
<i>State v. Cross</i> , 3 Vt. 220; 21 Am. Dec. 620.	720	<i>Stout v. State</i> , 25 Ind. 697.	710
<i>State v. Danforth</i> , 40 Iowa, 45; s. c., 20 Am. Rep. 627.	191	<i>Stegall v. Stegall's Admr.</i> , 3 Brook. C. C. 220.	146
<i>State v. DeLong</i> , 20 Ind. 212.	122	<i>State v. Swift</i> , 25 Ind. 805.	715
<i>State v. Dowers</i> , 45 N. H. 245, 246.	292	<i>State v. Taylor</i> , 29 Ind. 517.	716
<i>State v. Harris</i> , 45 Mo. 125.	242	<i>State v. Tenney</i> , 25 Mich. 222.	293
<i>State v. Elliott</i> , 14 Tex. 422.	125	<i>State v. Tudor</i> , 1 Day (Conn.), 120.	180
<i>State v. Ellis</i> , 74 Mo. 276; s. c., 41 Am. Rep. 321.	222	<i>State v. Watson</i> , 45 Mo. 74.	244
<i>State v. Farris</i> , 45 Mo. 125.	242	<i>State v. Whitford</i> , 25 N. C. 423.	604
<i>State v. Foley</i> , 15 Nov. 64; s. c., 27 Am. Rep. 424.	204	<i>State v. Wiemer</i> , 67 Mo. 12.	162
<i>State v. Galloway</i> , 3 Cold. 220.	220	<i>State v. Williams</i> , 21 La. Ann. 225; s. c., 20 Am. Rep. 272.	60
<i>State v. Garrett</i> , 71 N. C. 65; s. c., 27 Am. Rep. 1.	101	<i>State v. Williams</i> , 2 Bajer 25.	291
<i>State v. Glimanton</i> , 3 N. H. 431.	312	<i>State v. Woodh</i> , 5 Fred. L. 120.	292
<i>State v. Goyette</i> , 31 N. J. 220.	204	<i>State v. W. W. W. 11 Bush. 24.</i>	293
<i>State v. Graham</i> , 74 N. C. 646; s. c., 21 Am. Rep. 424.	191	<i>Steinmetz v. Versailles etc., Turapike Co.</i> , 27 Ind. 497.	292
<i>State v. Grand Trunk Railway</i> , 20 Mo. 170, s. c., 4 Am. Rep. 224.	425	<i>Steinmeyer v. City of St. Louis</i> , 3 Mo. App. 224.	200
<i>State v. Harris</i> , 20 N. C. 1.	445	<i>Stephen's case</i> , 404.	293
<i>State v. Harrison</i> , 20 Yerg. 549.	601	<i>Stephenson v. Hall</i> , 14 Barb. 225.	293
		<i>Sterling v. Warden</i> , 41 N. H. 217.	110
		<i>Stetson v. Day</i> , 31 Mass. 624.	600
		<i>Stevenson v. Newham</i> , 12 C. B. 225.	670
		<i>Stewart v. Brooklyn and Cross Town R.</i> , 20 N. Y. 220, s. c., 45 Am. Rep. 122.	245
		<i>Stier v. City of Oskaloosa</i> , 41 Iowa, 225.	292
		<i>Stillwell v. Kaappor</i> , 60 Ind. 522; s. c., 25 Am. Rep. 220.	425
		<i>St. John v. Homans</i> , 3 Mo. 225.	294
		<i>St. Louis, etc., R. Co. v. Mathers</i> , 224 Ill. 207.	713

TABLE OF CASES CITED.

xxxi

	PAGE.		PAGE.
St. Louis, etc., R. Co. v. Myrtle, 51 Ind.	729	The King v. Inhabitants of Maidstone,	149
Stokes v. Solomon, 3 Harv. 75.	297	12 East, 220.	149
Stokes v. State, 5 Bush. 210; s. c., 25	304	Thielman v. Berg, 73 Ill. 200.	200
Am. Rep. 226.	304	Thorne v. Hammond, 45 Cal. 220.	220
Stokes v. Stevens, 40 Cal. 201.	201	Thomas v. Garvan, 4 Dev. 220.	220
Stokes v. White, 1 Cron. M. & R. 220.	220	Thomas v. State, 40 Tex. 45.	45
Stone v. Bishop, 4 Cliff. 220.	220	Thompson's case, 122 Mass. 422; s. c.,	422
Story v. New York Elevated Railroad,	15	25 Am. Rep. 270.	270
30 N. Y. 122; s. c., 42 Am. Rep. 122.	15	Thompson v. Burton, 14 Johns. 22.	22
Story v. Odin, 12 Mass. 127.	127	Thompson v. Ketchum, 3 Johns. 122.	122
Story v. People, 70 Ill. 45; s. c., 25 Am.	220	Thompson v. Phoenix Ins. Co., 70 Mo.	22
Rep. 122.	220	25, s. c., 45 Am. Rep. 227.	22
Street v. Wood, 15 Barb. 105.	105	Thompson v. Pioche, 44 Cal. 220, 217.	217
Strohmayer v. Zeppenfeld, 3 Mo. App.	100	218.	100
Sturtevant v. Dunkirk, Warren and Pitts-	20	Thompson v. Riggs, 5 Wall. 220.	220
burgh Railway, 57 Penn. St. 220.	220	Thorndike v. City of Boston, 1 Metc.	210
Stewart v. People, 3 Scam. 220.	220	220.	210
Sturges' case, 45 N. H. 420.	220	Thorne v. Insurance Co., 20 Penn. St.	125
Sturges v. Bank of Circleville, 11 Ohio	77	12.	125
St. 122.	77	Thorp v. Rutland and Burlington Rail-	220
Sturges v. Spofford, 45 N. Y. 445.	445	road Co., 27 Vt. 122.	220
Sullivan v. Commonwealth, 60 Penn.	220	Threshold's Adm'r v. Pittsburgh's Ex'r,	247
St. 220.	220	2 Leigh, 451.	247
Sullivan v. Hearn, 2 Col. 424.	424	Thurston v. Hancock, 12 Mass. 220.	220
Sumner v. Hamlet, 25 Pick. 75, 25.	44	Tilton v. Tilton, 20 N. H. 220.	220
Suwa v. State, 4 Ind. 216.	216	Tinney v. N. J. Steamboat Co., 18 Abb.	420
Suwa v. Scott, 11 S. & R. 125.	125	Pr. (N. S.) 1.	420
Suwa's Appeal, 3 Brewst. 101.	445	Tisdale v. Norton, 5 Metc. 220.	220
Sweeney v. Union Manuf. Co., 40 Conn.	707	Tobey v. County of Bristol, 3 Story,	220
220.	707	220.	220
Sweeney v. Master, 1 Wall. 102.	220	Todd v. Lotah, 75 Penn. St. 122.	122
Sweet v. McCallister, 4 Allen, 220.	2	Todd v. Railroad, 3 Allen, 18; 7 id. 207.	207
Swindon Water-works Co. v. Wills &	220	Todd v. Rowley, 3 Allen, 51.	51
Berks Canal Co., L. R., 7 H. L. 407;	220	Toledo, etc., Ry. Co. v. Brannagan, 75	707
L. R., 9 Ch. App. 421.	220	Ind. 420.	707
Swinton v. Swinton, 20 Deav. 211.	211	Toledo, etc., R. Co. v. City of Lafay-	710
Swink v. French, 11 Lea, 70; s. c., 47	415	ette, 22 Ind. 220.	710
Am. Rep. 277.	415	Toledo, etc., Ry. Co. v. Owen, 45 Ind.	710
Switzerland v. Columbian Ins. Co., 37	206	425.	710
N. Y. 174.	206	Toledo, etc., Ry. Co. v. Prince, 20 Ill.	710
Swire v. Leach, 15 C. B. (N. S.) 475, 425A.	4	22.	710
Sylvester v. Downer, 12 Vt. 22.	220	Toledo, etc., Ry. Co. v. Rodriguez, 47	710
Symmes v. Brown, 10 Ind. 210.	210	Ill. 220.	710
Symonds v. Harris, 31 Ma. 14.	220	Tompkins v. Brown, 1 Den. 220.	220
		Tomlinson v. Greenfield, 21 Ark. 220.	220
Taber v. Delaware, etc., R. Co., 71 N.	100	Tonelle v. Hall, 4 Const. 140.	440
Y. 420.	100	Tool Co. v. Morris, 3 Wall. 45.	745
Talbot v. Singleton, 45 Cal. 220.	220	Torney v. True, 45 Cal. 105.	220
Talbot v. Hudson, 16 Gray 417.	417	Toussy v. Taw, 10 Ind. 212.	777
Talbot v. Harris 93 N. Y. 227, 271.	271	Towanda Coal Co. v. Heaman, 20 Penn.	220
Tapley v. Smith 18 Ma. 12.	12	22 412.	220
Tarleton v. Baker 18 Vt. 2.	2	Town of Albion v. Heacock, 20 Ind. 245;	245
Tate v. Citizen Ins. Co. 12 Gray, 79.	79	s. c., 45 Am. Rep. 220.	220
Tate v. McLean 74 Ind. 420.	420	Townsend v. Cowles, 21 Ala. 420.	420
Taylor v. Griswold, 2 Green (N. J.), 220.	220	Townsend v. Maynard, 45 Penn. St. 122.	122
Taylor v. Horie 1 Burr. 20.	20	Townsend and Pastor's case, 4 Leon.	100
Taylor v. Watkins 22 Ind. 311.	311	22.	100
Teall v. Barton 40 Barb. 157.	157	Tracy Passage, 20 Cl. & Fin. 124, 121.	124
Tebbs v. Robinson 22 Hun 245.	245	Train v. Jones, 11 Vt. 444.	444
Temptation v. People 3 Hun 357.	357	Trenler v. Stewart, 25 Ala. 420.	420
Terre Haute, etc., R. Co. v. Buck, 20	477	Trenton Mutual Life and Fire Ins. Co.	570
Ind. 445, 350.	477	v. Johnson, 4 Zabr. 270.	570
Terre Haute, etc., R. Co. v. Pierce, 20	779	Triet v. Child, 21 Wall. 441.	441
Ind. 445.	779	Troup v. Smith, 20 Johns. 22.	22
Terry v. Merchants etc., Bank, 65 Ga.	220	Trueblood v. Hollingsworth, 45 Ind.	220
277.	220	227.	220
Texas Bank and Ins. Co. v. Cohen, 47	22	Truman v. Fenton, Corp. 544.	544
Tex. 425; s. c., 25 Am. Rep. 220.	22	Trustee, etc., Town of Fort Hampton	220
Thatcher v. Humble, 67 Ind. 444.	704	v. Kirk, 24 N. Y. 220; s. c., 25 Am.	220
Thayer v. St. Louis, etc., R. Co., 25	170	Rep. 220.	220
Ind. 25.	170	Trustess v. Penick, 15 N. H. 210.	210
Thayer v. St. L. and T. H. R., 25 Ind.	220	Tuchelder v. Eddle, 4 Dillon, 25.	220
22.	220	Tucker v. Ingan, 4 M. & G. 220, 1972.	220
The King v. Inhabitants of Ken, East,	149	Tucker v. St. Louis Ry. Co., 54 Mo. 177.	177
22.	149	772.	177
		Tuff v. Warman, 5 Q. B. (N. S.) 570.	570
		Turner v. Patton, 49 Ala. 400.	400
		Turner v. State, 7 Tex. Ct. App. 220.	220
		Tuttle v. Lawrence, 110 Mass. 275.	275

	PAGE.		PAGE.
<i>Twombly v. Central Park, etc.,</i> N. Y. 185; s. c. 25 Am. Rep. 182, 184, n.	181	<i>Walker v. Great West. Ry. Co.,</i> L. E. 2 Bxch 228	792
<i>Twort v. Twort,</i> 15 Ves. 124.	695	<i>Walker v. Gregory,</i> 25 Ala. 179	69
<i>Uhl v. May,</i> 5 Neb. 127	725	<i>Walker v. Old Colony & Newport Rail- way,</i> 103 Mass. 12, 14; s. c., 4 Am. Rep. 509	15, 20
<i>Ulmer v. Applegate,</i> 25 Penn. St. 149	279	<i>Walker v. Sedgwick,</i> 5 Cal. 493.	698
<i>Ullman v. Barnard,</i> 7 Gray, 555	6	<i>Walker v. State,</i> 7 Tex. Ct. App. 245; s. c., 32 Am. Rep. 255	191
<i>Ulrich v. People,</i> 20 Mich. 245	138	<i>Wall v. Cameron,</i> 5 Cal. 205	275
<i>Union Bank v. Coster,</i> 3 N. Y. 212; 25 Am. Dec. 290	300	<i>Wallace v. Latham,</i> 22 Miss. 293.	292
<i>Union National Bank v. Orr,</i> 15 Fed. Rep. 622	442	<i>Walsh v. Mayre,</i> 52 How. Pr. 224.	719
<i>Union Trust Co. v. Weber,</i> 22 Ill. 242	298	<i>Walton v. Westwood,</i> 73 Ill. 125.	125
<i>United States v. American Gold Coin,</i> 1 Woodw. 217	204	<i>Ward v. Byrne,</i> 5 M. & W. 648	689
<i>United States v. Elder,</i> 4 Cr. C. C. 207	22	<i>Ward v. Colahan,</i> 20 Ind. 205	779
<i>United States v. Giltman,</i> 1 Mackay, 428; s. c., 47 Am. Rep. 247	622	<i>Ware v. Jones,</i> 61 Ala. 292.	45
<i>United States v. Jackson,</i> 104 U. S. 41.	205	<i>Warfield v. Lindell,</i> 20 Mo. 222; s. c., 18 Mo. 578	303
<i>United States Express Co. v. Kelfor,</i> 22 Ind. 228	772	<i>Waring v. Mayor,</i> 5 Wall. 110	109
<i>United States v. New Bedford Bridge,</i> 1 Wood & M. 440	225	<i>Waring v. U. S. Tel. Co.,</i> 4 Daley, 292. 516	516
<i>United States v. Wilson,</i> 7 Pat. 120 72.	279	<i>Warnock v. Davis,</i> 14 Otto, 775.	573
<i>United States v. Worrall,</i> 2 Dall. 224	702	<i>Warren v. Thomaston,</i> 73 Me. 229; 42 Am. Rep. 307 ante 211	629
<i>Upton v. Rice,</i> 12 Moore, 503, 22 Eng. C. L. 451.	212	<i>Wasmer v. Delaware, etc.,</i> R. Co., 20 N. Y. 212, s. c., 25 Am. Rep. 602, 176. 224	224
<i>Upton v. Starbridge Mills,</i> 111 Mass. 428	46	<i>Waterbury Savings Bank v. Lawler,</i> 42 Conn. 243	227
<i>Uran v. Coster,</i> 109 Mass. 521.	227	<i>Waterman v. Buckland,</i> 1 Mo. App. 45. 445	445
<i>Urguhart v. City of Ordensburg,</i> 21 N. Y. 27; s. c., 42 Am. Rep. 212	200	<i>Waters v. Monarch Ins. Co.,</i> 25 L. J. (N. S. Q. H. 102, 103	6
<i>Usher v. Richardson,</i> 20 Me. 412.	99	<i>Waters Pierce Oil Co. v. Little Rock,</i> 39 Ark. 412	222
<i>Valpy v. Gibson,</i> 4 C. B. 257	47	<i>Waters v. Shant,</i> 2 A. & E. (N. S.) 705. 779	210
<i>Vance v. Campbell,</i> 1 Dana, 222.	452	<i>Watson v. Garvin,</i> 54 Mo. 204.	242
<i>Vance v. Erie R. Co.,</i> 21 N. J. L. 224	202	<i>Watson v. Jones,</i> 12 Wall. 679.	622
<i>Vance v. Farmers and Mechanics' Bank,</i> 1 Blackf. 79	202	<i>Watson v. State,</i> 55 Ala. 123	201
<i>Vandersee v. McGregor,</i> 15 Wend. 545. 245	244	<i>Watson v. State,</i> 13 Tex. Ct. App. 75	203
<i>Van Pelt v. City of Davenport,</i> 22 Iowa, 305; s. c., 20 Am. Rep. 622.	409	<i>Watson v. Williams,</i> 22 Miss. 291	221
<i>Vanderpool v. O'Hanlon,</i> 22 Iowa, 245; s. c., 24 Am. Rep. 216	409	<i>Watson v. Williams,</i> 22 Miss. 291.	273
<i>Varell v. Wendell,</i> 20 N. H. 421.	222	<i>Watson v. Walker,</i> 22 N. H. 471.	210
<i>Varick v. Smith,</i> 5 Paige, 127.	249	<i>Weaver v. Hamilton,</i> 3 Jones L. 242	212
<i>Vaughn v. Taft Vale Railway,</i> 5 H. & N. 578, 585, 587	20	<i>Webb v. Jones,</i> 15 N. J. Eq. 109	222
<i>Van Wyck v. Aspinwall,</i> 17 N. Y. 120	244	<i>Webb v. Home, etc.,</i> R. Co., 49 N. Y. 420 s. c., 10 Am. Rep. 222	175
<i>Vogler v. Montgomery,</i> 54 Mo. 577	725	<i>Webb v. Virginia,</i> 102 U. S. 244.	160
<i>Viall v. Smith,</i> 5 B. I. 477.	616, 619	<i>Weed v. Richardson,</i> 2 Dev. & Bus. Law, 535	160
<i>Vitus v. Bangs,</i> 25 Wis. 120	120	<i>Weinger v. Murphy,</i> 2 Head. 674	105
<i>Vinal v. Richardson,</i> 12 Allen, 271, 282. 220	220	<i>Wells, Ex parte,</i> 15 How. 311.	625
<i>Vinton v. Crowe,</i> 4 Cal. 200.	68	<i>Wells v. Doane & Gray,</i> 201.	144
<i>Vyee v. Wakefield,</i> 6 Mass. & W. 442, 443	222	<i>Wells v. Foster,</i> 5 M. & W. 140	742
<i>Vorhees, S. N. J. L. 141</i>	69	<i>Weston v. State,</i> 91 U. S. 275	202
<i>Voss v. German American Bank,</i> 22 Ill. 422	127	<i>Westworth v. Whittemore,</i> 1 Mann. 471. 422	422
<i>Vowles v. Young,</i> 15 Ves. 140, 615, 617. 615	615	<i>West v. Blake & Blackf.,</i> 204.	212
<i>Wabash, etc., Ry. Co. v. Shacklett,</i> 105 Ill. 204; s. c., 44 Am. Rep. 791	722	<i>West v. Citizens Ins. Co.,</i> 27 Ohio St. 1 s. c., 22 Am. Rep. 224	20
<i>Wadleigh v. Gilnea,</i> 6 N. H. 12.	97	<i>Western Union Tel. Co. v. Byers,</i> 2 Cal. 141	275
<i>Wager v. Troy Union Railroad,</i> 25 N. H. 525, 526	14	<i>Western Union Tel. Co. v. Pendleton,</i> 8 Ind. 12	191
<i>Wagner v. Blawell,</i> 3 Iowa, 226.	149	<i>Weston v. Chamberlain,</i> 7 Omb. 401	8
<i>Walte v. Merrill,</i> 16 Am. Dec. 229	49	<i>Weston v. City of Syracuse,</i> 17 N. Y. 110	422
<i>Walt v. Morris,</i> 3 Wend. 224	212	<i>Wells v. H. C., etc.,</i> R. Co., 22 Iowa, 120	224
<i>Walden v. Sherburne,</i> 15 Johns. 422	224	<i>Wheelock v. Second Nat. Bk.,</i> 1 Dart. 100 s. c., 21 Am. Rep. 722	222
<i>Walker's case,</i> 22 N. C. 25	221	<i>Wheeling v. B. & O. R. Co.,</i> 12 Gratt. 20	222
<i>Walker v. British Guarantee Associa- tion,</i> 18 Q. B. 277.	110	<i>Wheelock v. Boston & Albany Railroad</i> 15 Mass. 23	22
<i>Walker v. Forbes,</i> 25 Ala. 120, 127; 60 Am. Dec. 422	222	<i>Whicker v. Hume,</i> 7 H. L. Cas. 164	222
		<i>Whitely v. Whittemore,</i> 1 Head. 629.	717
		<i>White v. Corporation of Yanco City,</i> 27 Miss. 357	200
		<i>White v. Egan,</i> 2 Bay, 247	429
		<i>White v. Elwell,</i> 42 Me. 220; 1 Washb. Real Prop. 401	125

TABLE OF CASES CITED.

xxxiii

PAGE.	PAGE.
White v. Milwaukee City R. Co., Wis. consd. Supreme Court, 20 Cent. L. J. 11...	Wilson v. State 18 Ind. 302 ... 798
White v. National Bank, 108 U. S. 413...	Winchell v. Insurance Co., U. S. C. C. Mass. 8 Ins. L. J. 551. ... 134
White v. Webb, 15 Conn. 302 ... 6	Winder's case, 32 Md. 419 ... 499
White v. Winnalimmet Co., 7 Cush. 128. 496	Winoski v. Gokey, 49 Vt. 283 ... 298
White Lick Quarterly Meeting v. White Lick Quarterly Meeting, 39 Ind. 120 ... 494	Winter v. Belmont Mining Co., 53 Cal. 428 ... 707, 708
Whitelocke v. Baker, 13 Ves. 514 ... 617	Winter v. Landphere, 42 Iowa, 471 ... 397
Whitin v. Paul, 13 B. I. 40 ... 505	Witman v. Lex, 17 S. & R. 88 ... 144
Whitman v. Leonard, 3 Pick. 177 ... 544	Wittakowsky v. Wasson 71 N. C. 454 ... 46
Whittem v. State, 35 Ind. ... 260	Wolcott v. Heath, 78 Ill. 483 ... 444
Whittier v. Stege, 61 Cal. 300 ... 602	Wolf v. Goddard, 9 Watts, 550 ... 120
Whitney v. Inhabitants of Leominster, 126 Mass. 25 ... 614	Wood v. Barker, 49 Mich. 293, 278. ... 436
Whittaker v. Howe, 3 Beav. 208 ... 429	Wood v. Cox, 2 Myl & Cr. 684. ... 204
Whittem v. State, 35 Ind. 120; 20 Am. Law Reg. 428 ... 260	Wood v. Fowler, 40 Am. Rep. 320... 206
Wickersham v. Lee, 20 Penn. St. 416 ... 573	Wood v. Kelley, 10 Me. 47. ... 610
Wiggins Ferry Co. v. Chicago R. Co., 6 Mo. App. 247 ... 204	Wood v. Manley, 11 Ad. & E. 34 ... 159
Wigmore v. Jay, 6 Exch. 254 ... 406	Wood v. McCain, 6 Dana, 266. ... 751
Wilcox's appeal, 15 Penn. St. 251 ... 457	Wood v. Rutland Ins. Co., 31 Vt. 552 ... 34
Wilbur v. Smith, 5 Allen, 194 ... 458	Woodman v. Spencer, 54 N. H. 507 ... 312
Wilcox v. Henderson, 64 Ala. 585 ... 396	Woodruff v. North Bloomfield, etc., 8 Sawyer, 529 ... 540
Wilcox v. Jackson, Ill. 201 ... 207	Woodruff v. Parham, 8 Wall. 123 ... 261
Wilcox v. Nolze, 34 Ohio St. 580... 69, 68	Woodward v. Washburn, 3 Denio, 329, 371 ... 308
Wilcox v. Railroad, 20 N. Y. 306 ... 606	Woolley v. M. D. Co., 2 Ex. Div. 289; 21 Moak Eng. 507 ... 400
Wilcox v. Savage, 1 Sto. 22 ... 308	Woolley's case, 11 Bush, 95 ... 259, 269
Wildes v. State, 28 Ind. 206 ... 178	Woolley v. Sergeant, 8 N. J. L. 202 ... 310
Wilkins v. Ordway, 50 N. H. 373 ... 387	Workingmen's Bank v. Converse, 38 La. Ann. 903 ... 206
Wilkinson v. Adam, 1 Vesey & Beam. 448 ... 446	Worthen v. Grand Trunk Railway, 126 Mass. 99 ... 39
Willard v. Pinard, 44 Vt. 34 ... 179	Worthington v. Hyler, 4 Mass. 126, 438, 440 ... 440
Willard v. Taylor, 5 Wall. 557 ... 608	Wright v. Atkins, 1 T. & R. 157 ... 264
Williams v. Cammack, 27 Miss. 109 ... 173	Wright v. Hicks, 15 Ga. 160. ... 140
Williams v. Higgins, 69 Ala. 517 ... 48	Wright v. Hooker, 10 N. Y. 51 ... 600
Williams v. Hutchinson, 8 N. Y. 312; 32 Am. Dec. 301; Cooley Torta, 225 ... 208	Wright v. Moore, 21 Wend. 230 ... 604
Williams v. N. Y. Cent. R., 16 N. Y. 97 ... 14	Wright v. N. Y. C. R. Co., 25 N. Y. 608, 307 ... 307
Williams v. Planters' Ins. Co., 57 Miss. 20; 8 C., 34 Am. Rep. 494 ... 308	Wright v. Saddler, 20 N. Y. 329, 330. ... 108
Williams v. State, 67 Ala. 200 ... 305	Wright v. Simpson, 6 Ves. Jr. 714, 734. ... 310
Williams v. Tiedemann, 6 Mo. App. 200. 445	Wright v. Wilcox, 19 Wend. 343; 32 Am. Dec. 507 ... 700
Williams v. Vanderbilt, 28 N. Y. 517 ... 173	Wuesthoff v. Seymour, 22 N. J. Eq. 66 ... 439
Williamson v. Chicago, etc., R. Co., 68 Iowa, 126; 8 C., 36 Am. Rep. 208 ... 740	Wukeman v. Sheridan 9 N. Y. 85 ... 347
Willis v. Long Island Railroad, 34 N. Y. 570. ... 39	Wyatt v. Williams, 43 N. H. 107. ... 300
Willis v. Lowe, 5 Notes of cases, 421 ... 455	Wyckoff v. Queens Co. Ferry Co., 52 N. Y. 32, s. c., 11 Am. Rep. 652 ... 426
Willis v. Wenscraft, 23 Cal. 614 ... 601, 602	Wylde v. Northern R. Co. of New Jersey, 53 N. Y. 156 ... 39
Willis v. Willis, 53 Vt. 1. ... 545	Wynne v. State, 56 Ga. 113 ... 190
Wilmarth v. Burt, 7 Metc. 257 ... 601	Yates v. Mullen, 24 Ind. 277 ... 164
Wilson v. Branch, 71 Va. 65 ... 308	Yates v. Lansing, 9 Johns. 417 ... 264
Wilson v. Brown, 22 Ind. 471 ... 429	Yearsley v. Heane 14 M. & W. 322 ... 601
Wilson v. City of Charleston, 5 Allen, 504 ... 604	Yerkes v. Salomon 11 Hun, 471 ... 446
Wilson v. Com., 10 Bush, 289; 8 C., 19 Am. Rep. 70 ... 68	Young v. Baster, 55 Ind. 188 ... 154
Wilson v. North Pacific R. Co., 28 Minn. 379; 8 C., 37 Am. Rep. 410 ... 151	Young v. Harvey, 16 Ind. 314 ... 140, 141
	Zollar v. Janvrin, 47 N. H. 324 ... 316
	Young v. Robertson, 4 Macq. H. L. Cas. 314, 325 ... 300
	Young v. Yarmouth, 9 Gray, 266 ... 8, 9, 10, 12

CASES OVERRULED, DOUBTED AND DENIED.

- Barefield v. State** (14 Ala. 608), denied ; **People v. Markham** (64 Cal. 157), 702, 704.
- Chicago R. v. Pondrom** (51 Ill. 388 ; 2 Am. Rep. 806), denied ; **Dun v. Seaboard and Roanoke R. Co.** (78 Va. 645), 393.
- City of Detroit v. Beckman** (84 Mich. 125 ; 22 Am. Rep. 507), denied ; **Gould v. City of Topeka** (32 Kans. 485), 500.
- City of Navasota v. Pearce** (46 Tex. 525 ; 26 Am. Rep. 279), denied ; **Gould v. City of Topeka** (32 Kans. 485), 498, 500.
- Clark v. Allen** (11 R. I. 439 ; 23 Am. Rep. 496), denied ; **Gilbert v. Moore** (104 Penn. St. 74), 578.
- Cluff v. Mutual, etc. Ins. Co.** (18 Allen, 306), doubted ; **Bloom v. Franklin Life Ins. Co.** (97 Ind. 478), 472, 473.
- Collier v. Early** (54 Ind. 559), overruled ; **Terre Haute, etc. R. Co. v. Buck** (96 Ind. 346), 175.
- Cummings v. Gossett** (19 Vt. 310), denied ; **Richardson v. Bricker** (7 Colo. 58), 345.
- Detroit v. Blakeby** (21 Mich. 84 ; 4 Am. Rep. 450), denied ; **Gould v. City of Topeka** (32 Kans. 485), 498.
- Fairbanks v. Kerr** (70 Penn. St. 86 ; 10 Am. Rep. 664), denied ; **Terre Haute, etc., R. C. v. Buck** (96 Ind. 346), 175.
- First Cong. Soc. v. Miller** (15 N. H. 522), denied ; **Richardson v. Bricker** (7 Colo. 58), 345.
- Fogarties v. Skillman** (12 Rich. 518), denied ; **Dickinson v. Coates** (79 Mo. 251), 232.
- Hatfield v. Roper** (21 Wend. 615), denied ; **Huff v. Ames** (16 Neb. 139), 7, 17.
- Horner v. Starkey** (27 Ill. 18), denied ; **Richardson v. Bricker** (7 Colo. 58), 345.
- Isaacs v. Third Ave. R. Co.** (47 N. Y. 122 ; 7 Am. Rep. 418), denied ; **Carter v. Somerville, etc., Ry. Co.** (96 Ind. 552), 789.
- Krach v. Heilman** (53 Ind. 517), overruled ; **Terre Haute, etc. R. Co. v. Buck** (96 Ind. 346), 175.
- Laing v. Calder** (8 Penn. St. 479), denied ; **Dun v. Seaboard and Roanoke R. Co.** (78 Va. 645), 391.
- Lee v. Giles** (1 Bailey, 449 ; 21 Am. Rep. 476), denied ; **Hummer v. Lamphear** (32 Kans. 439), 498.
- McCutcheon v. Homer** (48 Mich. 483 ; 38 Am. Rep. 212), denied ; **Gould v. City of Topeka** (32 Kans. 485), 498, 500.
- McDowell v. Bank of Wilmington** (1 Harring. 369), denied ; **People's Bank of Wilkesbarre v. Segrand** (103 Penn. St. 309), 128.

xxxvi CASES OVERRULED, DOUBTED AND DENIED.

- McManus v. Crickett** (1 East, 106), denied; **Carter v. Louisville, etc., Ry. Co.** (98 Ind. 552), 788.
- Mum v. Burch** (25 Ill. 85), denied; **Dickinson v. Coates** (79 Mo. 251), 283.
- Murray v. Haverty** (70 Ill. 820), doubted; **McCord v. Oakland Quicksilver Mining Co.** (64 Cal. 184), 691.
- New Jersey Railroad v. Kennard** (21 Penn. St. 208), denied; **Dun v. Seaboard and Roanoke R. Co.** (78 Va. 645), 898.
- Norton v. Shepard** (48 Conn. 142; 40 Am. Rep. 157), denied; **Richardson v. Bricker** (7 Colo. 58), 845.
- Owsley v. M. and W. P. R. Co.** (87 Ala. 560); denied; **Jordan v. Alabama, etc., R. Co.** (74 Ala. 85), 800, 804.
- Pitzer v. Russell** (4 Oreg. 124), denied; **Hummer v. Lamphear** (82 Kans. 489), 498, 496.
- Pray v. Mayor, etc.** (82 N. J. L. 894), denied; **Gould v. City of Topeka** (82 Kans. 485), 498.
- Pullman, etc., Co. v. Barker** (4 Colo. 844; 34 Am. Rep. 89), denied; **Terre Haute, etc., R. Co. v. Buck** (96 Ind. 846), 173, 175.
- Roberts v. Austin** (26 Iowa, 815), denied; **Dickinson v. Coates** (79 Mo. 251), 283.
- Ryan v. N. Y. etc., R. Co.** (85 N. Y. 210), denied; **Terre Haute, etc., R. Co. v. Buck** (96 Ind. 846), 175.
- Spencer v. Railroad** (17 Wis. 487), denied; **Dun v. Seaboard and Roanoke R. Co.** (78 Va. 645), 898.
- State v. Harrison** (10 Yerg. 542), overruled; **State v. Gardner** (18 Lea, 184), 661, 662.
- State v. Parham** (5 Jones, 416), denied; **Alonzo v. State** (15 Tex. Ct. App. 878), 208.
- State v. Mainor** (6 Ired. 840), denied; **Alonzo v. State** (15 Tex. Ct. App. 878), 208.
- Union Nat. Bk. v. Oceana County Bk.** (80 Ill. 212), denied; **Dickinson v. Coates** (79 Mo. 251), 283.
- Urquhart v. City of Ogdensburgh** (91 N. Y. 67; 43 Am. Rep. 212), denied; **Gould v. City of Topeka** (82 Kans. 485), 500.
- Whitaker v. Howe** (8 Beav. 888), overruled; **Wiley v. Baumgardner** (97 Ind. 66), 429.
- Winchell v. Insurance Co.** (8 Ins. L. J. 851), denied; **Smith v. Nat. Life Ins. Co.** (103 Penn. St. 177), 125.
- Winter v. Behmont Mining Co.** (63 Cal. 428), overruled in part; **Barstow v. Savage Mining Co.** (64 Cal. 888), 707, 708.
- Wright v. Wilcox** (19 Wend. 848; 82 Am. Dec. 507), denied; **Carter v. Louisville, etc., Ry. Co.** (98 Ind. 552), 788.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

MANSFIELD V. EDWARDS.

(186 Mass. 15.)

Negotiable instrument — evidence of relations of parties — contribution.

In an action for contribution upon a promissory note purporting to be made by A. as principal, and the plaintiff and defendant as sureties, evidence is competent to show that the signers were joint makers by agreement.*

ACTION for contribution upon a note. The opinion states the facts.

H. W. Ely and *C. F. Ely*, for plaintiff.

G. M. Stearns, for defendant.

C. ALLEN, J. [Omitting other points.] The third count set forth specially that one Alden and the plaintiff and the defendant were joint makers of a promissory note, a copy of which the plaintiff was unable to give, but which was described; and that the plaintiff, the defendant, and said Alden were each bound to pay an equal proportion of the principal and interest thereof; that the plaintiff paid \$3,680 thereof, and the defendant about \$1,100.85 thereof; that Alden became insolvent; and the plaintiff claimed a contribution from the defendant as a

* See *Robinson v. Barnett* (18 Fla. 602), 48 Am. Rep. 827.

joint maker with the plaintiff of the promissory note. And there was an averment that the three counts were for one and the same cause of action.

The original answer, upon which at the outset the case proceeded to trial, denied each and every allegation of the declaration and denied that the plaintiff paid the note mentioned in the declaration ; meaning, no doubt, in the third count of the declaration.

It would seem, though it is not stated in direct terms, that the note itself was introduced in evidence by the plaintiff, and there was no dispute as to its execution ; and both in the body of the note and in the signatures, Alden was expressly mentioned and designated as principal, and the plaintiff and the defendant as sureties, the name of the plaintiff standing before that of the defendant. Upon the face of the note there was nothing from which it could be inferred that the relation of the parties to each other was any thing else than that the plaintiff and the defendant were joint sureties for Alden. Assuming therefore that the payments by the plaintiff and the defendant respectively were made as alleged, nevertheless the production of the note did not support the averments of the third count that the three parties who signed it were joint makers, and each bound to pay an equal proportion of the principal and interest ; and if the proof had rested there, and if objection had been taken, the judge would have been obliged to rule that there was a variance. The plaintiff however did not intend to rest his case so, and offered to prove that the signers of the note, by agreement among themselves, were joint makers ; but upon the defendant's objection, the court ruled that parol evidence was not admissible to change the relations of the parties to each other as expressed in the note. The question therefore arises whether this ruling was correct.

Ordinarily the rights and duties of innocent holders of negotiable paper, toward the signers, are what appear from the face of the instrument. Indorsers must have notice. Sureties have a right that no extension shall be given to the principal. In an action by the holder, upon the paper itself, it is a general rule, though perhaps subject to exceptions not necessary to be dwelt upon here, that the holder's rights depend exclusively upon the form of the instrument, and the capacity in which the several parties to it respectively assume to stand. But in an action for indemnity or contribution, as between the parties themselves who have become bound

Mansfield v. Edwards.

for the payment of the instrument, whether it be a note, a bill, or a bond, a different rule prevails. In such case, the action is upon a different and collateral agreement, and proof of an oral collateral agreement that as between themselves the parties shall stand in a different relation from that which would be inferred from the form of the instrument which is signed, or even from that which is expressed in explicit terms upon the face of such instrument, does not have the effect to contradict or vary its terms. The written instrument is designed to express the undertaking and obligation of the signers to the holder of it, and is not designed to show their agreement or understanding among themselves. For example, if A. applies to B. to borrow money, and B. has no money on hand, but is willing to lend his credit, he may give his note directly to A. as payee, or to a third person for A.'s benefit, or may accept a bill of exchange drawn upon him by A. In either of these cases, *prima facie*, B. is the principal, but in each, if he pays the note or bill, he may maintain an action for indemnity against A., and show by parol evidence that he signed merely for A.'s accommodation.

Accordingly it has been held in a number of cases, that in an action for indemnity or contribution for money paid, parol evidence is admissible to show the true relations of the parties, no matter in what form their obligation may have been expressed in the instrument which they signed. Thus it has been held or declared that such evidence is competent in such an action by a first indorser against subsequent indorsers; *Weston v. Chamberlin*, 7 Cush. 401; *Phillips v. Preston*, 5 How. (U. S.) 278; by an indorser against principal and sureties; *Sweet v. McCallister*, 4 Allen, 353; by one joint promisor against other joint promisors; *Clapp v. Rice*, 13 Gray, 403; *Carpenter v. King*, 9 Metc. 511; 43 Am. Dec. 405; by one who was apparently a principal against a surety; *M'Gee v. Prouty*, 9 Metc. 547; by the drawer of a bill against the indorser; *Batson v. King*, 4 H. & N. 739; by the acceptor against the drawer; *Hawley v. Beverley*, 6 M. & G. 221; or against the indorser; *Griffith v. Reed*, 21 Wend. 502; by the maker of a note against the payee; 21 Wend. 505; by a surety against an accommodation indorser; *Harshman v. Armstrong*, 43 Ind. 126; by the principal on a note against a surety; *Robison v. Lyle*, 10 Barb. 512; by one surety against another, for full indemnity by the latter as principal. *Apgar v. Hiler*, 4 Zab. 812.

The competency of parol evidence for this purpose is also de-

clared in *Crosby v. Wyatt*, 23 Me. 156. See also Byles on Bills, 8, 9. It was indeed said by Mr. Justice DENIO, in *Barry v. Ransom*, 12 N. Y. 462, 465 : "The relations of joint or several obligors or promisors *inter sese* are, it is true, sometimes defined by their signatures to, or otherwise indicated in, the principal contract ; and in such cases the writing is the evidence of their agreement. *Harris v. Warner*, 13 Wend. 400. But in the absence of such indication, the form of the contract, as between the obligors or promisors and the other contracting party, does not prevent the introduction of parol proof to determine the relations of such obligors or promisors as between themselves." The case itself did not call for any such implied limitation of the competency of parol evidence, and the case of *Harris v. Warner*, which is referred to, simply held that the writing was *prima facie* evidence of the relations of the parties, with a clear implication that parol evidence to vary this would have been competent.

We are brought therefore to the conclusion that the evidence which was excluded was competent.

The defendant however, contends that the plaintiff was not injured by the exclusion of this evidence, for the reason that on the face of the note it would appear that he and the defendant were joint sureties for Alden, and that the plaintiff's rights, as against Alden and also as against the defendant, were greater, as the case stood, upon the mere production of the note, with the *prima facie* presumptions arising therefrom, than with full proof according to his offer of evidence. But this ground of argument overlooks considerations which are material to be considered. In the first place, the plaintiff ought to be allowed to allege and prove his case according to the actual facts. Moreover the plaintiff's case, in respect to the third count, was open to the objection of a variance, which objection the plaintiff might well wish to avoid. This objection was waived by not being taken. Besides the burden of proof rested upon the plaintiff to prove a payment made at the express or implied request of the defendant. The production of the note would be evidence tending to prove an implied request, it being in the nature of an admission by the defendant that the relations of the parties were what they appeared to be ; but there is no reason why the plaintiff should be limited to one kind of evidence to prove this material fact.

[Minor consideration omitted.]

Exceptions sustained.

Brewster v. Warner.

BREWSTER V. WARNER.

(126 Mass. 57.)

Bailment — injury by third person — action by bailee.

The plaintiff hired a horse and wagon. The defendant negligently injured the wagon while in his possession. At the plaintiff's request the owner had it repaired and the expense charged to the plaintiff. *Held*, that the plaintiff might recover for the damage without having paid such expense.

ACTION for negligence. The head-note shows the facts. The plaintiff had judgment below.

J. O. Teale, for defendants.

A. O. Brewster, for plaintiff.

HOLMES, J. The modern cases follow the ancient rule, that a bailee can recover against a stranger for taking chattels from his possession. *Shaw v. Kaler*, 106 Mass. 448; *Swire v. Leach*, 18 C. B. (N. S.) 479. See Year Book, 48 Edw. III. 20, pl. 8; 20 H. VII, 5, pl. 15; 2 Roll. Abr. 569, Trespass, P. pl. 5; *Nicolls v. Bastard*, 2 Cr. M. & R. 659, 660. And as the bailee is no longer answerable to his bailor for the loss of goods without his fault, his right to recover must stand upon his possession, in these days at least, if it has not always done so. But possession is as much protected against one form of trespass as another, and will support an action for damage to property, as well as one for wrongfully taking or destroying it. No distinction has been recognized by the decisions. *Rooth v. Wilson*, 1 B. & Ald. 59; *Croft v. Alison*, 4 id. 590; *Johnson v. Holyoke*, 105 Mass. 80. The ruling requested was obviously wrong, as it denied all right of action to the plaintiff, and was not confined to the *quantum* of damages.

Even if the question before us were whether the plaintiff could recover full damages, his right to do so could not be denied as matter of law. A distinction might have been attempted, to be sure, under the early common law. For although the bailee's right was undoubted to recover full damages for goods wrongfully taken from him, this was always accounted for by his equally undoubted responsibility for their loss to his bailor, and there is no

satisfactory evidence of any such strict responsibility for damage to goods which the bailee was able to return in specie.

But if this reasoning would ever have been correct, which is not clear, it can no longer apply when the responsibility of bailees is the same for damage to goods as for their loss, and when the ground of their recovery for either is simply their possession. Any principle that permits a bailee to recover full damages in the one case must give him the same right in the other. But full damages have been allowed for taking goods, in many modern cases, although the former responsibility over for the goods has disappeared, and has been converted by misinterpretation into the now established responsibility for the proceeds of the action beyond the amount of the bailee's interest. *Lyle v. Barker*, 5 Binn. 457; 7 Cow. 681, n. (a); *White v. Webb*, 15 Conn. 302; *Ullman v. Barnard*, 7 Gray, 554; *Adams v. O'Connor*, 100 Mass. 515, 518; s. c., 1 Am. Rep. 137; *Swire v. Leach*, 18 C. B. (N. S.) 492. The latter doctrine has been extended to insurance by bailees. *De Forest v. Fulton Ins. Co.*, 1 Hall, 84, 91, 110, 116, 132; CROMPTON, J., in *Waters v. Monarch Ins. Co.*, 25 L. J. (N. S.) Q. B. 102, 106.

If the bailee's responsibility over in this modern form is not sufficient to make it safe in all cases to recognize his right to recover full damages, even where it was formerly undoubted, at least it applies as well to recoveries for harm done to property as it does to those for taking. *Rindge v. Coleraine*, 11 Gray, 157, 162. And if full damages are ever to be allowed, as it is settled that they may be, they should be recovered in the present case, where the plaintiff appears to have made himself debtor for the necessary repairs with the bailor's assent. *Johnson v. Holyoke*, *ubi supra*. It is not necessary to consider what steps might be taken if the bailor should seek to intervene to protect his interest.

Exceptions overruled.

Pierce v. Drew.

PIERCE V. DREW.

(136 Mass. 75.)

Eminent domain — telegraph poles on highway.

The legislature may authorize the erection of a telegraph line on a highway without compensation to the owners of the fee. (*See note, p. 14*).

BILL for injunction. The opinion states the case. The defendant had judgment below.

A. D. Chandler, for plaintiffs.

F. Morison, for defendants.

DEVENS, J. The facts admitted by the demurrer may be thus stated : The plaintiffs own land on a certain street or public highway in Brookline ; they also own a fee in the half of the street which is next to their abutting land.

The defendants are the selectmen of Brookline, and on the application of the American Rapid Telegraph Company, a corporation organized under the statute of 1874, chapter 165* (Pub. Stats., ch. 106, § 14), for the transmission of intelligence by electricity, are about to grant to that company, under the public statutes, chapter 109, a location along said highway for their posts, wires, etc. The bill seeks to restrain the defendants upon the ground that the last-named statute is unconstitutional.

The Public Statutes, chapter 109, may be briefly summarized, so far as applicable, to the inquiry before us. By section 1 "every company incorporated for the transmission of intelligence by electricity" possesses the powers and is subject to the duties prescribed in the chapter. By section 2 the lines of telegraphic communication are to be so placed as not to incommode the public use of the highways or public ways. By section 3 the municipal authorities shall give the company a writing specifying where the posts, etc., may be located; and the location of posts, height of wires, etc., may be altered at any time by their direction. By section 4 the "owner of land near to or

* This statute authorizes any number of persons not less than three, to form a corporation "for the purpose of carrying on any lawful business," excepting certain kinds of business not material to be stated.

Pierce v. Drew.

adjoining a highway," may recover damages if injured thereby. By section 12 any injury to persons or property by the posts, wires, etc., is to render the company responsible in damages. By section 15 no easement or prescriptive rights are to be acquired by the erection and maintenance of the posts, etc. By sections 8-11, provisions are also made for the limit of the debts, the liability of the officers, and the duties of the company; and penalties are imposed for neglecting them.

That it was the intent of the statute to grant to those corporations, formed under the general incorporation laws, for the purpose of transmitting intelligence by electricity, the right to construct lines of telegraph upon and along highways and public roads upon the locations assigned them by the officers of the municipality wherein such ways are situate, cannot be doubted. The use of the words "every company" permits no other interpretation. Nor are we able to conceive why, if this authority might be given to corporations specially chartered, it may not equally be given to those organized under the general law.

If this use of property already appropriated to certain public uses is to be deemed of itself an exercise of the right of eminent domain, the determination of the legislature that the purpose for which it now directs it to be taken is a public use, is not necessarily conclusive; but if the use be public, it is conclusive that the necessity exists which requires it to be taken. *Talbot v. Hudson*, 16 Gray, 417. While in some cases there may be difficulty in deciding whether an appropriation of property is for a public or private use, such difficulty does not seem to exist in the present case. The transmission of intelligence by electricity is a business of public character, to be exercised under public control, in the same manner as transportation of goods or passengers by railroads. The statutes of 1849, chapter 93, of which, with additions, the public statutes, chapter 109, is a re-enactment, recognized its public nature; and in *Young v. Yarmouth*, 9 Gray, 386, which was an action for injuries sustained by a traveller on the highway by reason of the telegraph poles erected there under the location granted by the selectmen by authority of the statute of 1849, the town was held not liable because the poles were lawfully within the limits of the highway, and thus not such an obstruction or defect as to render it responsible. See also *Commonwealth v. Boston*, 97 Mass. 555; *Bay State Brick Co. v. Foster*, 115 id. 431. The public nature of this business has been

Pierce v. Drew.

recognized by the legislation of Congress, the decisions of the United States courts, and of many of the States of the Union. So far as known to us, it has not been held otherwise anywhere. U. S. Sts. of July 1, 1862; March 3, 1863; July 2, 1864; July 24, 1866. *Pensacola Telegraph v. Western Union Telegraph*, 96 U. S. 1.

No right is given these companies to use the highways at their own pleasure, or to compel in all cases, as the plaintiff suggests, locations therein to be given them by the municipal authorities. The second section of the statute is to be construed with the third section, and shows an intention that a legally constituted board shall determine not only where, but whether, there can be a location which shall not incommode the ordinary public ways, with full power to revise its own doings, and to correct any errors which the practical working of the arrangements may reveal. *Young v. Yarmouth*, *ubi supra*.

But as even if the legislature has the right to authorize the erection of telegraph poles along a highway, as a public use thereof, appropriate safeguards must be provided for any rights of property belonging to individual owners which may be taken or invaded, there remain these inquiries for our consideration: First, whether the statute does provide any compensation to the owner of the fee for this new use of the highway; second, whether he is entitled to such compensation; third, whether the owner of property near to, or abutting upon, the highway is entitled to any compensation therefor other than such as the act provides.

The fourth section provides for damages which may be sustained by owners of "land near to or adjoining a highway or road along which lines are constructed by the company." It is limited to these, and cannot be extended to those who are the owners of the fee in the highway or road itself. Nor does the twelfth section, as the defendants contend, make any provision for them. This simply enacts that, "when an injury is done to a person or to property by the posts, wires or other apparatus of a telegraphic line, the company shall be responsible in damages to the party injured." But the concluding clause of the section, by which it is provided that "the city or town shall not, by reason of any thing contained in this chapter or done thereunder, be discharged from its liability, but all damages and costs recovered against a city or town on account of such injury shall be reimbursed by the company owning the posts, wires or other apparatus," indicates clearly that the lia-

bility of the company provided for under this section is for injuries occasioned by defects or obstructions in the way which its structures may cause. This section was not in the statutes of 1849, chapter 93; its first clause was added to the legislation on this subject by the statutes of 1851, chapter 247, section 2, and the remaining clause was subsequently added by the statutes of 1859, chapter 260, sections 1, 2, it may fairly be presumed in view of the decision in *Young v. Yarmouth, ubi supra*, made in 1857.

As the chapter does not, in our opinion, provide for damages to the owner of the fee in the highway by reason of the erection of the telegraphic posts and apparatus, it is to be determined whether such a use of the highway creates a separate and additional burden, requiring an independent assessment of damages, for which the owner of the land was not compensated when the highway was laid out, and thus whether the omission of the act to provide for this compensation renders it unconstitutional.

It is to be observed, that for more than thirty years, the right to appropriate highways to this public use, without any compensation to the owners of the fee therein, has been asserted; that the statutes in regard to it have more than once been expounded by this court, without any apparent doubt of their validity; and that up to the present time, no suggestion has ever been made that the rights of such owners were in any way invaded. If the argument that these owners are entitled to compensation be correct, the estates of thousands have been wrongfully used while they were either ignorant of their rights or submissive to injustice; and in the meantime costly telegraphic structures have been erected, and the whole business of the State has accommodated itself to this system of the transmission of intelligence. After so long a practical construction by the legislature and the courts, and after so widely extended an acquiescence by parties whose estates or interests therein are directly affected, it would require a clear case to justify us in setting aside such a statute as unconstitutional, even if it be true, as it certainly is, that no usage for any course of years, nor any number of legislative or judicial decisions, will sanction a violation of the fundamental law, clearly expressed or necessarily understood. *Packard v. Richardson*, 17 Mass. 122, 144.; *Commonwealth v. Parker*, 2 Pick. 550, 557; *Holmes v. Hunt*, 122 Mass. 505. No right to take the private property of the owner of the fee in the highway is conferred by this act; all that is given is the right to use land,

Pierce v. Drew.

by permission of the municipal authorities, the whole beneficial use of which had been previously taken from the owner and appropriated to the public. It is a temporary privilege only which is conferred ; no right is acquired as against the owner of the fee by its enjoyment, nor is any legal right acquired to the continued enjoyment of the privilege, or any presumption of a grant raised thereby. Pub. Stats., ch. 109, § 15. The discontinuance of a highway would annul any permit granted under the statute, and no incumbrance would remain upon the land.

In *Chase v. Sutton Manuf. Co.*, 4 Cush. 152, 167, it is said by Chief Justice SHAW, "that where, under the authority of the legislature, in virtue of the sovereign power of eminent domain, private property has been taken for a public use, and a full compensation for a perpetual easement in land has been paid to the owner therefor, and afterward the land is appropriated to a public use of a like kind, as where a turnpike has by law been converted into a common highway, no new claim for compensation can be sustained by the owner of the land over which it passes." The case itself goes further than the illustration used by the chief justice. It related to a claim made by an owner in fee of land which had been taken by a canal company by statutory authority, for the purpose of a navigable waterway, which company had been permitted by statute to sell its property to a railway company ; but although the two modes of transportation were entirely different, the validity of the act was sustained, and the claim of the landowner for further compensation disallowed.

"It is well settled," says Mr. Justice GRAY, in *Boston v. Richardson*, 13 Allen, 146, 160, "that when land, once duly appropriated to a public use which requires the occupation of its whole surface, is applied by authority of the legislature to another similar public use, no new claim for compensation, unless expressly provided for, can be sustained by the owner of the fee."

When land has been taken or granted for highways, it is so taken or granted for the passing and repassing of travellers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, and for the transmission of intelligence between the points connected thereby. As every such grant has for its object the procurement of an easement for the public, the incidental powers granted must be so construed as most effectually to secure to the public the full

enjoyment of such easement. *Commonwealth v. Temple*, 14 Gray, 69, 77.

It has never been doubted, that by authority of the legislature highways might be used for gas or water pipes, intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose; or for sewers, whose object was not merely the incidental one of cleansing the streets, but also the drainage of private estates, the rights of which to enter therein were subject to public regulations. *Commonwealth v. Lowell Gas-Light Co.*, 12 Allen, 75; *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 517; s. c., 28 Am. Rep. 264; *Boston v. Richardson*, *ubi supra*.

Nor can we perceive that these are to be treated as incidental uses, as suggested by the plaintiff, because the pipes are conducted under the surface of the travelled way, rather than above it. The rights of the owner of the fee must be the same in either case, and the use of the land under the way for gas-pipes or sewers would effectually prevent his own use of it for cellarage or similar purposes.

When the land was taken for a highway, that which was taken was not merely the privilege of travelling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. Although the horse railroad was deemed a new invention, it was held that a portion of the road might be set aside for it, and the rights of other travellers, to some extent, limited by those privileges necessary for its use. *Commonwealth v. Temple*, *ubi supra*; *Attorney-General v. Metropolitan Railroad*, *ubi supra*. The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out. Under the clause to regulate commerce among the States, conferred on Congress by the Constitution of the United States, although telegraphic communication was unknown when it was adopted, it has been held that it is the right of Congress to prevent the obstruction of telegraphic communica-

Pierce v. Drew.

tion by hostile State legislation, as it has become an indispensable means of intercommunication. *Pensacola Telegraph v. Western Union Telegraph, ubi supra.*

No question arises as to any interference with the old methods of communication, as the statute we are considering, by section 8, guards carefully against this by providing that the telegraphic structures are not to be permitted to incommode the public use of highways or public roads. We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the State for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation.

There remains the inquiry, whether there is any objection to the statute because it does not provide a sufficient remedy for the owners of property near to or adjoining the way, who may be incidentally injured by the structures which the telegraph companies may have been permitted to erect along the line of the highway and within its limits. Such remedy is given by section 4 as the legislature deemed sufficient. We should not be willing to believe that the land owner thus injured would be without remedy, if the company failed to pay the damages lawfully assessed under this section, while it still endeavored to maintain its structures; but the only compensation to which such owner is entitled is that which the legislature deems just, when it permits the erection of these structures. The legislature may provide for compensation to the adjoining owners, but without such provision there can be no legal claim to it, as the use of the highway is a lawful one. *Attorney-General v. Metropolitan Railroad, ubi supra.*

The clause in the Declaration of Rights which provides that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," is confined in its application to property actually taken and appropriated by the government. No construction can be given to it which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense by means of the rightful use of property already belonging to the public. *Callender v. Marsh*, 1 Pick. 418, 430.

Pierce v. Drew.

The majority of the court is therefore satisfied that the demurrer to this bill was properly sustained, and the entry will be,

Decree affirmed.

NOTE BY THE REPORTER.—C. ALLEN, J., delivered the following dissenting opinion : “ A minority of the court, consisting of Mr. Justice WILLIAM ALLEN and myself, are unable to agree with the majority of the court upon the principal question in this case, which is this : When the public has acquired an easement in land for a highway, by taking it under the right of eminent domain, by prescription, by dedication, or by grant, is an additional servitude to be deemed as imposed by appropriating the highway, under legislative authority, for the use of a line of electric telegraph, by the erection of poles and wires above the surface of the ground, so that the owner of an abutting estate and of the soil to the center of the highway is entitled to further compensation therefor ? The corresponding questions are necessarily involved, whether when land is taken for a highway by the right of eminent domain it is to be considered as an element of the damages sustained by the owner, and to be paid by the city or town, that the land may be used, not merely for a highway, but also for a telegraph line ; and whether in case of a dedication or grant of land for a highway, with or without the payment of a consideration, the right of establishing a telegraph line along the highway, under the authority of general or special statutes, is also included by implication.

“ If such owner is in law entitled to further compensation, it is plain that the statute fails to meet the constitutional requirement, inasmuch as no adequate provision for such compensation is made. A mere right of action at law is not sufficient. *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50 ; s. c., 84 Am. Rep. 838.

“ It has been held in this Commonwealth and elsewhere, though without entire uniformity of decision, that the establishment of a street railway does not entitle the owner of the land to further compensation. *Attorney-General v. Metropolitan Railroad*, 125 Mass. 515 ; s. c., 28 Am. Rep. 264. Recognizing this decision as founded on just principles, the question remains, whether the same rule applies to other uses, and with what limitations, if any.

“ The great weight of opinion thus far expressed by courts is that street railways, with cars propelled by horse power, are not to be regarded as imposing a new servitude which will entitle the owner of the fee of the highway to additional compensation, but that steam railroads are to be so regarded. It is considered that the latter use is so far different in its nature, that the law ought to take notice that it could not have been within the contemplation of the parties that the laying out of an ordinary highway should also include such a mode of travelling. While it is always recognized that the proper and contemplated use of the highway is not to be deemed limited to such vehicles as are in use at the time, it is considered to be too great an extension of the easement acquired by the public to hold that it embraces its use for a steam railway. At this point the line has been drawn by a great weight of judicial decision. See *Williams v. New York Central Railroad*, 16 N. Y. 97 ; *Wager v. Troy Union Railroad*, 25 id. 526, 535 ; *Jersey City & Bergen Railroad v. Jer-*

Pierce v. Drew.

New City & Hoboken Horse Railroad, 20 N. J. Eq. 61; *Imlay v. Union Branch Railroad*, 26 Conn. 249, 255; *Grand Rapids & Indiana Railroad v. Heisel*, 38 Mich. 62; *Sherman v. Milwaukee, Lake Shore and Western Railroad*, 40 Wis. 645; *Kucheman v. Chicago, Clinton & Dubuque Railway*, 46 Iowa, 366; *Kaiser v. St. Paul, Stillwater & Taylor's Falls Railroad*, 22 Minn. 149; *Southern Pacific Railroad v. Reed*, 41 Cal. 256; *Cooley Const. Lim.* 546, 550; 2 Dill. Mun. Corp., §§ 722, 725.

"The use of a highway for the purpose of communicating information by electricity, by means of posts and wires erected along its course, may, in a certain sense, be said to be a use for a purpose similar to that for which highways are established, namely, the increase of communication between persons at different points. But this is a somewhat remote analogy, and the more direct purpose of establishing highways is to enable persons and teams to pass more easily from one place to another. The analogy between a steam railway and conveyance by ordinary teams is much more direct.

"The multiplication of telegraph and telephone posts and wires in thickly-settled places within the past few years makes the question at issue one of great importance. There can be no doubt that in many instances an actual injury is done to the remaining or abutting land along a highway or street by the erection of such posts and wires; and the extent to which this may be carried in the future cannot easily be foreseen. When a telegraph line consisted of only a single row of small posts, with a few wires, the matter was of less importance. But common observation shows that now the posts are large and numerous, fitted with cross-beams adapted for layer after layer of almost countless wires; and the establishment of the different kinds of electrical lines involves to some extent a destruction of trees along the highways or streets, an occupation of the ground, a filling of the air, an interference with access to or escape from buildings, an increased difficulty in putting out fires, an obstruction of the view, a presentation of unsightly objects to the eye, and a creation of unpleasant noises in the wind. The actual injury thus done to adjoining property may certainly be quite serious; and if when land is taken or granted for a highway, it is understood that such use may also be made of it, there can be no doubt that in many instances a very substantial increase of compensation would justly be granted to the owner; because in assessing damages when land is taken for a highway, it is not merely a question what the land actually taken is worth or what will be the extent of the injury from the deprivation of its use, but the owner is also entitled to compensation for the incidental injury to his remaining land which is to be estimated with reference to the use for which the land taken from him is to be appropriated, and such damages are to be allowed to him as will fairly compensate him in view of the purposes of the appropriation. *Walker v. Old Colony & Newport Railway*, 103 Mass. 10, 14; s. c., 4 Am. Rep. 509; *Johnson v. Boston*, 130 Mass. 452, 454.

"Heretofore the consequential injury to the remaining land of the owner, arising from the possibility of a future use of the highway for telegraph and telephone wires has never, so far as we have been informed, been considered as a proper element of damages. No case is cited or known where it has been

Pierce v. Drew.

held or even contended by counsel that damages should be included for such possible use.

“ If the right exists to establish electrical lines with many wires without further compensation, the owner is entitled to be paid at the outset for all such rights which are acquired against him on the assumption that they will be exercised to the full. No one can tell in advance how extensive a use will actually be made ; but if it is an incident to laying out a highway that lines of telegraph or telephone may be authorized, the owner of the land certainly has no control over the number of posts and wires that may be used, and the right is not subject to any limit except the discretion of other persons than himself. In fixing his compensation it must therefore be borne in mind that he has no right whatever to limit the use which may be made of the highway for these purposes. The result will follow that when his land is taken for a highway he will be entitled to receive, and the public will be compelled to pay damages, one element of which is uncertain. It may happen that no such use will be made of the highway. It may be the case that the authorities who lay out the way, and the city or town which has to pay the expenses of laying it out and keeping it in repair do not wish to take or pay for the right to have telegraph lines established on it. They may not think such a line in that place necessary or desirable. Nevertheless, if it is incident to laying out a highway that a telegraph line may thereafter be established upon it by the sanction of a future board of municipal officers, this right must of necessity be paid for at the outset unless the owner of the land will have a subsequent claim for additional damages ; otherwise his property is taken from him without compensation.

“ It is going quite too far to hold that in law it must be deemed to have been within the contemplation of the parties, at the time of the laying out of the highway, that it might be used for such new and additional purposes. They are in their nature essentially distinct from the ordinary use of a highway by travellers. It is not desirable to impose this new burden upon the laying out of highways. If the public convenience and necessity require a new highway but do not require a line of telegraph over it, the public authorities ought to be able to take such an easement as will subserve the public requirement without being subjected to the necessity of paying for a right which is not needed nor desired. The use of a highway for telegraphic purposes is not naturally included in the original design nor naturally incidental to its use for travel. Highways can be and are conveniently used without telegraphs or telephones. The latter can be established without the use of the highway. It may be convenient in many instances to use the highway for electrical lines. Whenever this proves to be the case, there is no hardship in requiring those who wish to establish such lines to pay for the privilege such damages, if any, as may be caused to the owners of property by such use. In many instances, no doubt, there would be no damages. But in cases where actual damage is thus caused, there is no good reason why it should not be paid for by those who will derive the benefit. It is more just and reasonable that such payments should be made as for an additional use or servitude, than that it should be included at the outset when it is not known whether such use will be required or not.

Pierce v. Drew.

“There is another reason for holding that the right to establish electrical lines is not included in the laying out of a highway. When land is taken for a highway, the payment of damages is to be made by the city or town within which it lies. But a city or town has no legal right to appropriate money for the establishment of a line of telegraph or telephone for the general public use. A direct vote of a town to subscribe for shares in a company, or to contribute money in aid of such establishment, would clearly be illegal and void, as not falling within the classes of objects for which municipal expenditures may be made. If therefore the owner of the land is entitled to be paid for the right to establish lines of telegraph or telephone along the highway in the future, as an incident to the use of the land for the highway, and if the city or town is to pay for the damages caused by the laying out of the highway, including all incidental damages to the remaining land, it follows that the city or town is thus made to contribute money, possibly against its will, for an illegal purpose. By construction of law, it will also be held to have paid money in the past for expenses which it had no actual intention and no legal right to incur. And the electrical companies will be declared entitled to reap the benefits accruing from such payment for their own advantage. The legislature has never intended to require or to allow towns and cities to pay for privileges to be enjoyed by electrical companies which may be organized under the general laws. It is at least doubtful if it has the constitutional right to do so. It would not be “wholesome and reasonable” legislation, within the meaning of the Constitution, to grant to a commercial corporation, established under general laws for purposes of profit, the right to obtain, without payment, a valuable privilege, for which a city or town has been compelled, against its will, to pay.

“An argument has been drawn from the judicial sanction which has been given to the use of streets for drains and sewers, and for gas and water pipes. But there is a palpable distinction between such uses and that for the establishment of a telegraph line. It may be said in a general way that when a highway is laid out, the whole beneficial use of the soil is temporarily taken from the owner and appropriated to the public use; and ordinarily the laying of underground pipes, in such a manner as to cause no injury to the adjoining land, does not deprive the owner of the fee of any use which he could otherwise have made of the soil. Ordinarily therefore he cannot be deemed to suffer any legal injury from the laying of underground pipes. A different question however might by possibility arise, if such pipes interfered with underground operations which the owner might carry on, notwithstanding the existence of the highway. Then again sewers and drains are built more directly by public officers, and usually are of direct benefit to the abutting estates as well as to the streets themselves. The advantage to abutting owners is so apparent that under our statutes they may be assessed for the expenses of construction. Gas-pipes also are likely to be of direct service in furtherance of the purposes for which streets are laid out, aiding public travel and benefiting the abutting lots. There is a general recognition that all these uses are directly subservient to the purposes for which highways are established; and by statute towns are authorized or required to lay water-pipes, erect watering-

Pierce v. Drew.

troughs and fountains, set out and maintain shade trees, erect guide posts and erect and maintain street lamps. Pub.Sts., chap.27, §§ 1-4; chap.54, §9. But the erection of telegraph lines along a highway is of no direct and peculiar benefit to travellers upon the highway, to the highway itself, or to abutting estates; and as has been seen, such lines do or may interfere materially with the beneficial use and enjoyment which the owner of the soil might otherwise have of his estate.

"The fact that the statute provides that no permanent easement shall be acquired by a telegraph company is not material. While the line exists, the injury to the owner is continuous; and he is deprived, without his consent, of the rightful use of his property for a period which, though indefinite and liable to be determined, may yet be perpetual, and which he himself is powerless to bring to an end.

"The authorities which hold that using a highway for a steam railroad imposes an additional servitude, for which the owner of the fee is entitled to additional compensation, go farther than is necessary to support the view above taken. The case of *Attorney-General v. Metropolitan Railroad*, 125 Mass. 515; s. c., 28 Am. Rep. 264, related only to horse railroads, and leaves it an open question in this State as to steam railways. The case of *Callender v. Marsh*, 1 Pick. 418-431, as to damage caused by changing the grade of the street, has always been recognized as a hard case, and an intimation was given at the time that the legislature might well interfere by general or special statute for the relief of parties so injured. The doctrine of that case should not be extended.

"In *Young v. Yarmouth*, 9 Gray, 386, the telegraph line was established, so far as appears, by the land owner's consent, and no question involving his rights arose or was considered.

"As to elevated railroads, it was held by a majority of the justices of the New York Court of Appeals, that an abutting owner, even if he does not own the fee of any part of the street, has such a property as to be entitled to additional compensation. *Story v. New York Elevated Railroad*, 90 N. Y. 122; s. c., 43 Am. Rep. 146. The case would be much stronger if he owned the fee. In the Supreme Court of New York, and in the United States Circuit Court for the Northern District of Illinois, and in the Supreme Court of Illinois, it has been held that the use of a highway for a telegraph line will entitle such owner to additional compensation. *Dusenbury v. Mutual Telegraph*, 11 Abb. New Cas. 440; *Atlantic & Pacific Telegraph v. Chicago, Rock Island & Pacific Railroad*, 6 Biss. 158; *Board of Trade Telegraph v. Barnett*, 107 Ill. 507; s. c., 47 Am. Rep. 458."

The contrary doctrine to the principal case was held by the Special Term of New York Superior Court in *Metropolitan Telephone & Telegraph Co. v. Caldwell Lead Co.*, 67 How. Pr. 365. In that case the fee of the streets was in the city. The court said: "The fee thus vested in the city was in trust for a specified purpose, limited by the purpose for which the property was taken, and the trust upon which it was held; and the use to which the property could be put by the city must be limited by said trust — viz., to be appropriated and kept open as a public street. In *People v. Kerr*, 27 N. Y. 188, and the cases that have followed that case, it was held that a street railroad authorized by the legislature to be built in a street was valid as a proper regulation as a street use.

Pierce v. Drew.

In the case of *Mahady v. Bushwick Railroad Co.*, 91 N. Y. 148; s. c., 43 Am. Rep. 661, the court upheld those cases as deciding that such a horse railroad was a structure consistent with the right of the abutting owners in the streets, and these cases can now only be considered as authority for holding that such a railroad is a street use, which is within the power of the legislature to control. The power of the legislature over the street is however not unlimited; it is to govern and regulate such use or interest in the land as vested in the corporation under the provision of the law for the taking of the property. The city took the property in trust to appropriate it as a public street, and so far as it held it for a public street it was subject to the control of the legislature.

“That the power of the legislature over the streets is limited, and that the legislature had no authority to authorize a structure in a street that is inconsistent with such street use, was held in the *Story* case, 90 N. Y. 122; s. c., 43 Am. Rep. 146; and in discussing the question in that case, Judge DANFORTH says, at page 155: ‘Within this principle, its [the streets] surface might be broken up for the insertion of gas or water pipes or sewers or occupied by rails imbedded therein for surface railroad, but its limit would be found in these and like uses.’ It appears therefore that the power of the legislature is limited to a regulation of the use for which the property is held by the city in trust. As Judge DANFORTH says in the *Story* case, *supra*, p. 157: ‘It is certainly well settled that when a grant is made or trust created for a specific and defined purpose, the subject of the grant or trust cannot be used for another and foreign purpose without the consent of the parties from whom it was derived, or for whose benefit it was created.’

“Under this statute the city takes the fee in trust to be appropriated for a public street. That is ‘a specific and defined purpose.’ The property is paid for by the abutting owners; neither the city nor the State pays the amount awarded for the taking of the property, but the owners of the land on the street pay for whatever property is taken. The statute provides that such payment shall be apportioned among such abutting owners as they shall be benefited by the appropriation of such property as a public street; and that such abutting owners have an interest in the streets, is recognized in the *Story* case, *supra*, and *Mahady v. Bushwick Railroad Co.*, *supra*. I think therefore that the powers of the legislature to regulate the streets are confined to the uses for which they were taken, viz., to be appropriated and kept open as public streets. The plaintiff owns and operates a telephone line on Thirty-ninth street and uses poles to conduct the wires used in such business, and I am clearly of the opinion that such a use of the streets is not a street use, and does not come within the terms of the trust upon which the city holds the fee of the streets; and that so far as the rights of abutting owners are involved, the legislature had no power to authorize plaintiffs to use the streets for such a purpose.

“Plaintiffs cite the case of *People v. Metropolitan Telephone & Telegraph Co.*, 81 Hun, 596, but in that case the people were objecting to the use of the streets by plaintiffs and plaintiffs had the consent of the people for such use. As was said in the *Story* case, page 160, in speaking of the authority given by the legislature: ‘So far as the public is concerned it may stand; not so far as to the individual.’”

Powers v. Guardian Fire and Life Insurance Company.

POWERS v. GUARDIAN FIRE AND LIFE INSURANCE COMPANY.

(126 Mass. 103.)

Insurance — sale of property between partners — increase of risk.

The sale by one partner of his share of the partnership property to another partner and the taking a mortgage back are not a breach of a condition in an insurance policy against a sale of the property, nor necessarily an increase of the risk. (*See note, p. 22.*)

ACTION on an insurance policy. The opinion states the case.

W. S. B. Hopkins, for defendant.

H. C. Hartwell, for plaintiffs.

HOLMES, J. The defendant insured the plaintiffs, Powers and Baldwin, against loss by fire upon certain goods owned by them as partners, including their stock in trade. Afterward Powers sold his share to Baldwin, taking back a mortgage on the same goods. The only question reported to us is whether this transaction will prevent a recovery upon the policy. If any thing can be recovered, the amount is settled by agreement.

Apart from the conditions in the policy, the plaintiffs' case is clear. Both the contractees join in the suit, *Tate v. Citizens Ins. Co.*, 13 Gray, 79; and the plaintiff Powers retained an insurable interest after his sale, under the contemporaneous mortgage back to him, which was a part of the interest which he had when the policy was issued, and carved out of it. It is not necessary to consider, whether if he had retained no interest, an action could have been maintained in the name of the two for the benefit of Baldwin alone, as was thought in *Hobbs v. Memphis Ins. Co.*, 1 Sneed, 444, and denied in *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; or if so, what the extent of the recovery would be.

The defense relied on was a breach of the conditions of the policy. The words of the only material one are, "if without such assent (the written assent of the company), the said property shall be sold." There is nothing more; no proviso against "any change of title in the property insured, or of any undivided interest therein," as in *Dix v. Mercantile Ins. Co.*, *ubi supra*. We have

Powers v. Guardian Fire and Life Insurance Company.

no occasion to differ from this and similar decisions, so far as they go on the precise language used in those cases. But we think that the reason of the thing and the weight of precedent agree that the condition with which we have to deal has not been broken. If it were construed with any strictness against the defendant, or even literally, the condition would only be broken by a sale of the whole of "the said property" by the firm. See *Savage v. Howard Ins. Co.*, 52 N. Y. 502, 505; s. c., 11 Am. Rep. 741; *Scanlon v. Union Ins. Co.*, 4 Biss. 511. "The said property," taken literally, means the things described in the policy as insured, not the partial interest of one cotenant; and "sold" in connection with these words would naturally be taken to refer to the joint act of the joint party contracted with.

But we need not go so far in order to decide this case. Whatever might be the effect of a conveyance of his whole interest by one partner to a stranger, we think that such a conveyance to his copartner is not a breach. Assuming without argument, that if this were otherwise, the contemporaneous mortgage back would not save the condition, we think that partners jointly contracted with as such are to be regarded as so far only one person, and the condition as so far limited to keeping the ownership of the thing insured in some member of the insured body, that changes between themselves in the relative amounts or in the nature of their respective interests, do not fall within the fair meaning of the words used.

If we look beyond the interpretation of the words to the object of the condition, we cannot see any good reason why the insurers should wish to restrict the parties they deal with more narrowly. It is said that one of the parties loses his motive and right to keep a watch over the goods. That is hardly true in the present case; but even if it were, the insurers did not stipulate for any such supervision. Either partner had a perfect right to abstain from it, for any thing that is to be found in the policy. The proviso against the sale of the insured property is directed to a different point, the preservation of an insurable interest. So far as the object of preserving an insurable interest is concerned as the actual interest of partners in the firm property are necessarily fluctuating, there seems to be no particular reason why the insurers should wish to keep the state of the legal title unchanged as between them, — certainly no sufficient ground for extending the language chosen by the insurer beyond its plain and natural meaning.

Powers v. Guardian Fire and Life Insurance Company.

Our conclusion is sustained by the weight of authority in this country. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; s. c., 9 Am. Rep. 235; *Lockwood v. Middlesex Assur. Co.*, 47 Conn. 553, 564; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; s. c., 23 Am. Rep. 294; *Burnett v. Eufaula Ins. Co.*, 46 Ala. 11; s. c., 7 Am. Rep. 581; *Dermani v. Home Ins. Co.*, 26 La. Ann. 69; s. c., 21 Am. Rep. 544. See also *Cowan v. Iowa Ins. Co.*, 40 Iowa, 551; s. c., 20 Am. Rep. 583; *Scanlon v. Union Ins. Co.*, *ubi supra*.

As the sale by Powers was not a breach of condition, *a fortiori* a mortgage back to him was not. *Rice v. Tower*, 1 Gray, 426; *Judge v. Connecticut Ins. Co.*, 132 Mass. 521.

Some little reliance was placed on another condition: "If without such assent, the situation or circumstances affecting the risk shall, by or with the advice, agency, or consent of the insured, be so altered as to cause an increase of such risk." But if under any circumstances a general clause could be taken to carry the effect of a change of title higher than a special one expressly dealing with that subject, or if even in the absence of a special clause the present transaction could be brought within the scope of "circumstances affecting the risk" (*Houghton v. Manuf. Ins. Co.*, 8 Metc. 114, 122; *Allen v. Massasoit Ins. Co.*, 99 Mass. 160), we cannot say that it "caused an increase of such risk," as matter of law, after a finding for the plaintiffs.

Judgment on the finding for the plaintiffs.

NOTE BY THE REPORTER. — In *Hathaway v. State Ins. Co.*, Iowa Supreme Court, July, 1884, where one of the provisions of an insurance policy given to a partnership was that "if the title of the property is transferred, incumbered or changed, * * * the policy shall be void," *held*, that a dissolution of partnership, and a sale by one partner to the other of his interest, is a change of title to the property, and will render the policy void. The court said: "The question as to the effect on the contract of insurance of the sale by one joint owner to another, of his interest in the joint property, when the policy contains a provision against alteration, has often been before the court, and the numerical weight of authority is probably in favor of the proposition that a sale by one partner to his co-partner of his interest in the partnership property does not have the effect to terminate a policy of insurance which contains a provision against the sale or transfer of the property." The case of *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405, is probably the leading case holding this doctrine. The policy in that case provided that it should be null and void "if the said property shall be sold or conveyed." The policy was issued to a partnership, one member of which sold his interest in the property to his copartner

Powers v. Guardian Fire and Life Insurance Company.

before the loss, and it was held that this did not have the effect to avoid the policy. Another holding is followed in *Dermanti v. Ins. Co.*, 26 La. Ann. 69; s. c., 21 Am. Rep. 544; *Pierce v. Ins. Co.*, 50 N. H. 297; s. c., 7 Am. Rep. 235; *Burnett v. Ins. Co.*, 46 Ala. 11; s. c., 7 Am. Rep. 581, and *West v. Ins. Co.*, 27 Ohio, St. 1; s. c., 23 Am. Rep. 294, — in each of which cases the policy contained substantially the same provision. The ground upon which the holding is put is that the alienation against which the parties provided by the provision was of the whole of the insured property, and not merely a portion of it, or some interest in it less than the whole, and that a sale of his interest by one partner to his copartner was not such a disposition of the property as was contemplated by the parties when they framed the provision; that what was intended to be guarded against was such a transfer of the property as would change the proprietary interest therein of those with whom the insurers contracted, and substituted other parties with whom they had not consented to contract, but that the sale of his interest by one partner to his copartner did not have the effect to introduce a stranger to the contract, or to make any change in the condition or situation of the property or risk.

“In *Cowan v. State Ins. Co.*, 40 Iowa, 551; s. c., 20 Am. Rep. 588, the policy was issued to plaintiff, but before the loss he sold the insured property to a partnership of which he was a member. It contained a similar provision against alienation, and it was held by the court that as he retained an insurable interest in the property the policy was not avoided by the sale; that while the clause in the policy prohibited the alienation of the insured property, it did not forbid the sale of an interest therein less than the whole, and as long as plaintiff retained an insurable interest in the property, the policy attached to and protected that interest. We think it clear that this case does not sustain the position of appellee in the case now before us. The facts of the two cases and the questions involved are essentially different. In the one, the party seeking to enforce the contract was an original party to it, and the question involved was whether his right of recovery was defeated by his sale of an interest in the insured property, while in this case plaintiff is not personally a party to the contract, and the question is whether he acquired a right of action on the policy by his purchase of an additional interest in the property. Nor do we think that the other cases cited above are conclusive of the question here involved. The provisions of the policies involved in those cases were that the policies should be null and void if the property was sold or conveyed, while the provision in this case is that ‘if the title of the property is transferred, incumbered or changed, * * * the policy shall be void.’ The effect of this language is materially different from that used in the policies in the other cases. The title of the property would be transferred by a sale or conveyance of it to another person. If the word ‘changed’ had not been inserted in the provision, the effect of the language would have been the same as that used in the other policies, and the same construction which was put upon the provisions in those cases could fairly have been put upon it. But the parties having inserted in their contract words which fully express the provision that the policy would be avoided by a sale or conveyance of the property to a stranger, have also inserted another word by which the same

Powers v. Guardian Fire and Life Insurance Company

consequence is made to follow a change of the title to the property. It is certainly true that by a transfer of the title to the whole of the property to a stranger the title would be changed, but we cannot presume that the parties intended to express that provision by the use of the word 'changed,' for as we have seen, they had already fully expressed it by the words which precede it in the contract. This latter word was deliberately used by the parties, and we cannot reject it as construing the contract; and as it neither limits nor qualifies those which precede it, we are bound to presume that the parties intended by its use to express some provision or condition of their contract which was not otherwise expressed. The effect of the provision is, then, that the policy would be avoided either by a transfer of the title of the property insured to a stranger, or by a change of the title to it. This conclusion can be avoided, as we think, only by disregarding the elementary rules of construction. The case turns then upon the question whether a change of the title of the property resulted upon the dissolution of the partnership and the sale by Smith to plaintiff of all of his interest in the property, and it seems to us there can be but one answer to this question. During the existence of the partnership it cannot be said that plaintiff had title to any specific share or interest in the property. His claim was to the proportion of the residue which should be found to be due to him upon the final balance of the accounts of the firm after the conversion of the assets and the liquidation of its debts. But upon the dissolution of the partnership, and the purchase by him of Smith's interest, he was vested with the absolute title to the whole of the property.

"The conclusion we reach is sustained by the following authorities: *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Hartford Fire Ins. Co. v. Ross*, 28 Ind. 180; *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Wood v. Rutland Ins. Co.*, 31 Vt. 552."

In *Drennen v. London Assurance Corporation*, U. S. Circ., Minnesota, MILLER, J., charged the jury that a change or transfer between the partners would be no violation, but the introduction of a new partner avoided the policy. He said: "Many changes may take place in the title and also in the possession, without a sale or transfer of the property to another party; for instance, a sale by one partner to another has been held by the courts not to be such a sale or transfer as is included in this policy, and for the very obvious reason that the possession does not change; it remains where it was — the title remains, perhaps in the firm, although one member of the firm may have gone out; the question we have got to solve is whether the introduction of a new partner into the partnership firm whose goods are insured, is such a change as vests him with an interest which he did not have before, and vests another man with a right of control of the possession, and to have charge of the property, and will avoid this policy. Without going on to cite the authorities, we are both of the opinion that this is such a change as by that language was intended to avoid and forfeit the policy."

"The sale or the transmutation of the various interests between the partners themselves, and nobody else having the control, and leaving the possession where it was, does not invalidate the policy; but the introduction of a

Hedden v. Griffin.

new partner with an investiture of an interest in him, which he did not have before, does avoid the policy.

“ There are two things with regard to which insurers are always cautious, tenacious and anxious. One of them is the character of the men with whom they make the contract, and the other is the character of the man who has possession of the property, especially if it be movable property that is insured; and it is easy to see why this is so. They may very well know that the man or men with whom they deal when the contract is made are cautious, prudent business men, honest and for a long time successful in business. With those men they contract without hesitation. They have a right to know who those men are with whom they contract with regard to the possession of the property. They make a contract with A. because they know him, or because they have heard of his character — because they understand that he is honest and fair, and they deal with him just as you would deal with one whom you know to be reliable; you will seek to deal with honest men only. Now it is against all the principles of contracts to say that in dealing with one man or with two men, that those two can afterward, acting without the consent of the other party, introduce another man into the contract who has all the rights and all the control which those two had before; because that man may be known to be a scoundrel by the insurance company, and if that rule prevails the other parties have a right to introduce the veriest scum of the earth, and men who have half a dozen times been engaged in the destruction of property to get the insurance. So you may sell the goods insured, but you cannot sell the policy unless the company agrees to it. We are of the opinion that if Mr. Arndt was, within the meaning of that policy, introduced into that partnership, and became a member of it before the loss, and acquired an interest in the goods, the policy was forfeited.”

To the same effect is *Biggs v. North Car. Home Ins. Co.*, 88 N. C. 141. See also *Texas Bank. and Ins. Co. v. Cohen*, 47 Tex. 406; s. c., 26 Am. Rep. 298.

HEDDEN V. GRIFFIN.

(136 Mass. 229.)

Agency — action against insurance agent for fraud — damages.

One fraudulently induced by an insurance agent to take a policy may rescind the contract and recover from him the premium paid.*

ACTION for fraud. The opinion states the case. The plaintiff had judgment below.

* See *Kroeger v. Pitcairn* (101 Penn. St. 311), 47 Am. Rep. 718; *Thompson v. Phoenix Ins. Co.* (75 Me. 55), 46 Am. Rep. 357.

Hedden v. Griffin.

W. S. B. Hopkins, for defendant.

F. P. Goulding & W. A. Gile, for plaintiff.

MORTON, C. J. In order to maintain an action of tort for deceit, it is necessary for the plaintiff to show that the false representations alleged in his declaration are representations of material facts calculated to deceive him and induce him to act. Representations as to matters which are merely collateral, and do not constitute essential elements of the contract into which the plaintiff is induced to enter, are not sufficient. It was held in the case of *Penn Ins. Co. v. Crane*, 134 Mass. 56 ; s. c., 45 Am. Rep. 282, that representations like those alleged in the declaration in the case at bar are material in their nature ; and that the party insured, having been induced by them to enter into the contract of insurance, had the right to cancel his policy, and was not liable to the company upon his promissory note given for the premium. That case decisively shows that the plaintiff in the case at bar is entitled to maintain his action.

The principal question in the case is as to the measure of the damages which the plaintiff is entitled to recover. It appeared at the trial that the plaintiff was induced by the false representations of the defendant, who was the general agent of the New York Life Insurance Company of New York, to take a fifteen years' endowment policy for \$10,000 in said company, and to pay the first premium thereon ; that before the second premium became due he discovered the fraud and notified the defendant of his intention to cancel the policy, and demanded the amount of the premium he had paid. It also appeared that the said company was solvent ; that the policy until cancelled was a good policy ; and that the premium was a fair premium for such a policy. The defendant contended that upon these facts the plaintiff could recover no damages, or at most only nominal damages, contending that the "measure of damages is the difference in money value between what he got and what he would have got had the representations been true."

If the plaintiff had elected to retain his policy, this rule of damages would be correct. *Morse v. Hutchins*, 102 Mass. 439. But upon discovering the fraud, the plaintiff had his election of two remedies. He could retain his policy, or he could cancel and repudiate it and have resort to the defendant for the fraud prac-

Sawyer v. Davis.

ticed upon him. This right of rescinding his contract is important to the plaintiff, as his contract was an executory one extending over fifteen years, and its value depended not merely on the present condition of the company but largely upon its future management. The defendant cannot control this election. The plaintiff had the right to and did elect to cancel the policy; his notice to the defendant, the agent of the company, was a cancellation; he could not thereafter maintain an action against the company; and he had in his hands no property of value to be returned.

We are of opinion that under these circumstances he has a right to recover damages of the defendant to an amount which will put him in the same position as if the fraud had not been practiced on him. As a consequence of the fraud he has paid out a sum of money as a premium for which he has got nothing. We think he is entitled to recover it of the defendant. The contention of the defendant that the cancellation of the policy was the cause of the loss of the premium paid, seems to us to be a refinement which leads to unjust results. The fraud of the defendant was the cause both of the payment by the plaintiff and of the cancellation. If he had not cancelled the policy he would perhaps not have lost the premium he had paid, but the exercise of this incidental right of cancellation cannot in any legal sense be said to be the cause of his loss. To hold, as the defendant claims, would be to deprive the plaintiff of his right of election for the benefit of the defendant.

We are therefore of opinion that the instructions given at the trial were sufficiently favorable to the defendant.

Exception overruled.

SAWYER V. DAVIS.

(133 Mass. 289.)

Constitutional law — statute authorizing act enjoined as nuisance.

The ringing of mill-bells at a certain hour having been enjoined as a nuisance, the legislature may authorize the ringing at that hour.*

BILL of review. The plaintiffs were restrained by a decree made October 1, 1881, from ringing a bell on their mill before the

* See *Davis v. Sawyer* (133 Mass. 289), 43 Am. Rep. 519.

Sawyer v. Davis.

hour of six and one-half o'clock in the morning ; which decree was affirmed September 7, 1882. March 28, 1883, the legislature passed an act, which took effect upon its passage, as follows : " Manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weight, in such manner and at such hours as the board of aldermen of cities and the selectmen of towns may in writing designate." April 18, 1883, the selectmen of Plymouth licensed the plaintiffs to ring the bell on their mill in such manner and at such hours, beginning at five o'clock in the morning, as they were accustomed to do prior to the injunction. The bill prayed that the injunction might be dissolved, or the decree might be so modified as to enable the plaintiffs to act under the license without violating the decree. The defendants demurred ; case reserved.

C. G. Davis, for defendants.

F. D. Allen, for plaintiffs.

C. ALLEN, J. Nothing is better established than the power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. *Bancroft v. Cambridge*, 126 Mass. 438, 441. In most instances, the illustrations of the proper exercise of this power are found in rules and regulations restraining the use of property by the owner, in such a manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to a like limitation ; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with, until it becomes a question how the right which each person has of prosecuting his lawful business in a reasonable and proper manner shall be made consistent with the other right which each person has to be free from unreasonable disturbance in the enjoyment of his property. *Merrifield v. Worcester*, 110 Mass. 216, 219 ; s. c., 14 Am. Rep.

Sawyer v. Davis.

592. In this conflict of rights, police regulations by the legislature find a proper office in determining how far and under what circumstances the individual must yield with a view to the general good. For example, if in a neighborhood thickly occupied by dwelling-houses, any one, for his own entertainment or the gratification of a whim, were to cause bells to be rung and steam-whistles to be blown to the extent that is usual with the bells and steam-whistles of locomotive engines near railroad stations in large cities, there can be no doubt that it would be an infringement of the rights of the residents, for which they could find ample remedy and vindication in the courts. But if the legislature, with a view to the safety of life, provides that bells shall be rung and whistles sounded, under those circumstances, persons living near by must necessarily submit to some annoyance from this source, which otherwise they would have a right to be relieved from.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful and necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety, as in the case of railroads, or to the necessary or convenient operation and management of their own works ; and ordinarily such determination is binding upon the courts, as well as upon citizens generally. And when the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. *Bancroft v. Cambridge*, 126 Mass. 441. It is accordingly held in many cases and is now a well established rule of law, at least in this Commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the legislature, must, if the running of the trains is so authorized, be borne by the individual without compensation or remedy in any form. The legislative sanction makes the business lawful, and defines what must be accepted as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification

Sawyer v. Davis.

that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law. *Presbrey v. Old Colony & Newport Railway*, 103 Mass. 1, 6, 7; *Walker v. Old Colony & Newport Railway*, id. 10, 14; s. c., 4 Am. Rep. 509; *Bancroft v. Cambridge*, 126 Mass. 441; *Call v. Allen*, 1 Allen, 137; *Commonwealth v. Rumford Chemical Works*, 16 Gray, 231, 233; *Struthers v. Dunkirk, Warren & Pittsburgh Railway*, 87 Penn. St. 282; *Hatch v. Vermont Central Railroad*, 28 Vt. 142, 147; *Brand v. Hammersmith & City Railway*, L. R., 1 Q. B. 130; 2 Q. B. 223; 4 H. L. 171; *Vaughan v. Taff Vale Railway*, 5 H. & N. 679, 685, 687; *Rex v. Pease*, 4 B. & Ad. 30; Sedgw. St. & Const. Law, 435, 436.

The recent case of *Baltimore & Potomac Railroad v. Fifth Baptist Church*, 108 U. S. 317, is strongly relied on by the defendants as an authority in their favor. There are however two material and decisive grounds of distinction between that case and this. There the railroad company had only a general legislative authority to construct works necessary and expedient for the proper completion and maintenance of its railroad, under which authority it assumed to build an engine-house and machine-shop close by an existing church, and it was held that it was never intended to grant a license to select that particular place for such works, to the nuisance of the church. Moreover, in that case, the disturbance was so great as not only to render the church uncomfortable, but almost unendurable as a place of worship, and it virtually deprived the owners of the use and enjoyment of their property. We do not understand that it was intended to lay down, as a general rule applicable to all cases of comparatively slight though real annoyance, naturally and necessarily resulting in a greater or less degree to all owners of property in the neighborhood from a use of property or a method of carrying on a lawful business which clearly falls within the terms and spirit of a legislative sanction, that such sanction will not affect the claim of such an owner to relief; but rather that the court expressly waived the expression of an opinion upon the point.

In this Commonwealth, as well as in several of the United States and in England, the cases already cited show that the question is settled by authority, and we remain satisfied with the reasons upon which the doctrine was here established. Courts are compelled to

Sawyer v. Davis.

recognize the distinction between such serious disturbances as existed in the case referred to, and comparatively slight ones which differ in degree only, and not in kind, from those suffered by others in the same vicinity. Slight infractions of the natural rights of the individual may be sanctioned by the legislature under the proper exercise of the police power, with a view to the general good. Grave ones will fall within the constitutional limitation that the legislature is only authorized to pass reasonable laws. The line of distinction cannot be so laid down as to furnish a rule for the settlement of all cases in advance. The difficulty of marking the boundaries of this legislative power, or of prescribing limits to its exercise, was declared in *Commonwealth v. Alger*, 7 Cush. 53, 85, and is universally recognized. Courts however must determine the rights of parties in particular cases as they arise; always recognizing that the ownership of property does not of itself imply the right to use or enjoy it in every possible manner, without regard to corresponding rights of others as to the use and enjoyment of their property; and also that the rules of the common law, which have from time to time been established, declaring or limiting such rights of use and enjoyment, may themselves be changed as occasion may require. *Munn v. Illinois*, 94 U. S. 113, 134.

In the case before us, looking at it for the present without regard to the decree of this court in the former case between these parties, we find nothing in the facts set forth which show that the statute relied on as authorizing the plaintiffs to ring their bell (Stat. 1883, ch. 84) should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the legislature to be convenient if not necessary, for the purpose of giving notice, by ringing bells, and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers. In character, it is not unlike numerous other instances to be found in our statutes, where the legislature has itself fixed, or has authorized municipal or other boards or officers to fix, the places, times, and methods in which occupations may be carried on, or acts done, which would naturally be attended with annoyance to individuals. The example of bells and whistles on locomotive engines has already been mentioned. Reference may also be made to the statutes regulating the use of stationary steam engines, the places and manner of manufacturing or keeping petroleum, of carrying on other offensive

trades and occupations, of storing gunpowder, and of establishing hospitals, stables, and bowling-alleys.

The defendants however contend that a different question arises in the present case, where the plaintiffs rely upon a legislative sanction given to acts after it had been determined by this court that the doing of them was attended with a peculiar injury to the defendants, which entitled them to a remedy as for a nuisance. There can be no doubt that such sanction would be a good defense to an indictment for a nuisance; or to a proceeding instituted by an individual, whose only grievance was that he had sustained special damage in consequence of being disturbed in the enjoyment of some public right, such as a right to travel upon a highway or river. His public right may clearly be regulated and controlled by the legislature, after a decision by the court as well as before. *Commonwealth v. Essex Co.*, 13 Gray, 239, 247. But the argument is urged upon us with great force, that in the present case there had been a judicial determination that the ringing of the bell, at the hours now authorized by the terms of the statute and the designation of the selectmen, was a private nuisance to the defendants, not growing out of any public right, and that the statute ought not, as a matter of construction, to be held applicable to this case; or if such is its necessary construction, that it is unconstitutional, as interfering with their vested rights.

In the first place, we can have no doubt that the statute by its just construction is in its terms applicable to the present case. It is undoubtedly true that neither a general authority nor a particular license is to be so construed as to be held to sanction what was not intended to be sanctioned. A general authority is not necessarily to be treated as a particular license; *Commonwealth v. Kidder*, 107 Mass. 188; and in some cases, even where a particular license or authority has been given, as to keep an inn, ale-house or slaughter-house in a particular place, which is specified, this authority has not been deemed to sanction the keeping of it in an improper manner. *Rex v. Cross*, 2 C. & P. 483; *Commonwealth v. McDonough*, 13 Allen, 581, 584; *State v. Mullikin*, 8 Blackf. 260; *United States v. Elder*, 4 Cr. C. C. 507. And ordinarily a statute which authorizes a thing to be done, which can be done without creating a nuisance, will not be deemed to authorize a nuisance. In such case it is not to be assumed that it was contemplated by the legislature that what was so authorized would have the necessary

Sawyer v. Davis.

effect to create a nuisance, or that it would be done in such a manner as to create a nuisance ; and if a nuisance is created, there will in such cases ordinarily be a remedy at law or in equity. *Eames v. New England Worsted Co.*, 11 Metc. 570 ; *Haskell v. New Bedford*, 108 Mass. 208, 215 ; *Commonwealth v. Kidder*, 107 id. 188. But on the other hand, the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act. When the legislature authorized factory bells to be rung, it must have been contemplated that they would be heard in the neighborhood. That is a natural and inevitable consequence. The legislature must be deemed to have determined that the benefit is greater than the injury and annoyance ; and to have intended to enact that the public must submit to the disturbance, for the sake of the greater advantage that would result from this method of carrying on the business of manufacturing. It must be considered therefore in this case, that a legislative sanction has been given to the very act which this court found to create a private nuisance.

It is then argued that the legislature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court ; and this is undoubtedly true, so far as such rights have become vested. For example, if the plaintiff under an existing rule of law has a right of action to recover damages, for a past injury suffered by him, his remedy cannot be cut off by an act of the legislature. So also if in a suit in equity to restrain the continuance of a nuisance, damages have been awarded to him, or costs of suit, he would have an undoubted right to recover them, notwithstanding the statute. But on the other hand, the legislature may define what in the future shall constitute a nuisance, such as will entitle a person injured thereby to a legal or equitable remedy, and may change the existing common-law rule upon the subject. It may declare, for the future, in what manner a man may use his property or carry on a lawful business without being liable to an action in consequence thereof ; that is, it may define what shall be a lawful and reasonable mode of conduct. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of which the court is the final judge ; but within this limitation, the exercise of the police power of the legislature will apply to all within the scope of its terms and

spirit. The fact that the rights of citizens, as previously existing, are changed, is a result which always happens ; it is indeed in order to change those rights that the police power is exercised. So far as regards the rights of parties accruing after the date of the statute, they are to be governed by the statute ; their rights existing prior to that date are not affected by it. To illustrate this view, let it be supposed that the case between the present parties in its original stage had been determined in favor of the manufacturers, under which decision they would have had a right to ring their bell ; and that afterward a statute had been passed providing that manufacturers should not ring bells except at such hours as might be approved by the selectmen ; and that these manufacturers had then proceeded to ring their bell at other hours, not included in such approval. It certainly could not be said that they had a vested right to do so, under the decision of the court.

The injunction which was awarded by the court, upon the facts which appeared at the hearing, did not imply a vested right in the present defendants to have it continued permanently. Though a final determination of the case before the court, and though binding and imperative upon the present plaintiffs, and enforceable against them by all the powers vested in a court of equity, yet they were at liberty at any time, under new circumstances making it inequitable for it to be longer continued, to apply to the court for a review of the case and a dissolution of the injunction. In respect to such a state of facts, an injunction can never be said to be final, in the sense that it is absolute for all time. Even without any new legislation affecting the rights of the parties, with an increase of their own business and a general increase of manufacturing and other business in the vicinity, and of a general and pervading change in the character of the neighborhood, it might be very unreasonable to continue an injunction which it was in the first instance entirely reasonable and proper to grant. The ears of the court could not under such circumstances be absolutely shut to an application for its modification, without any new statute declaring the policy of the Commonwealth in respect to any branch of business or employment. But a declaration by the legislature that in its judgment it is reasonable and necessary for certain branches of business to be carried on in particular ways, notwithstanding the incidental disturbance and annoyance to citizens, is certainly a change of circumstances which is entitled to the highest considera-

Cutler v. Ballou.

tion of the court ; and in the present case we cannot doubt that it is sufficient to entitle the plaintiffs to relief from the operation of the injunction.

[Omitting a consideration of procedure.]

Demurrer overruled.

CUTLER V. BALLOU.

(126 Mass. 357.)

Guaranty — continuing.

The following is not a continuing guaranty : “ Please deliver to H. goods as he may want from time to time, not exceeding in amount \$300, and if not paid for by him within thirty days I will be responsible for the same.” *

ACTION on guaranty. The opinion states the case.

O. A. Marden, for defendant.

J. B. Lord, for plaintiff.

MORTON, C. J. This is an action upon a written guaranty, signed by the defendant, and in the following words : “ Boston, April 9, 1880. A. L. Cutler & Co.— Gentlemen : Please deliver to Charles A. Howland goods as he may want from time to time, not exceeding in amount (\$300) three hundred dollars, and if not paid for by him within thirty days I will be responsible for the same.”

The question is whether this is a continuing guaranty, or a guaranty which was exhausted and satisfied by the first purchase by Howland of goods to the amount of \$300, followed by payment for the same. In determining this question, but little aid can be derived from the decided cases, as each case turns upon the particular language of the guaranty to be construed.

By the natural and grammatical construction of the guaranty in this case, the limitation, “ not exceeding in amount three hundred dollars,” applies to the goods to be delivered, and cannot fairly be construed merely as a limitation of the amount for which the guarantor would be responsible at any time, or from time to time. If the writing signed by the defendant had been in the words,

* See *Morgan v. Bomyer* (39 Ohio St. 324), 48 Am. Rep. 454.

“ Please deliver to Charles A. Howland goods as he may want from time to time, not exceeding in amount three hundred dollars, and charge the same to me,” the construction would be clear. It would hardly be contended that the plaintiff could deliver goods to a greater amount than \$300, and charge them to the defendant. Instead of authorizing the plaintiff to charge the goods to him, the defendant promises, that if the goods “are not paid for by him within thirty days, I will be responsible for the same ;” this does not enlarge the authority to deliver goods to a limited amount contained in the first part of the contract, but is a promise to be responsible for the same goods which the plaintiff is authorized to deliver to Howland. The words “from time to time,” in the connection in which they are used in this guaranty, import that all the goods to the amount of \$300 are not necessarily to be delivered at one time ; but they do not enlarge the limit fixed in the contract of the goods to be sold and of the credit to be given to Howland.

If the contract of the defendant had been that he would be responsible to the amount of \$300 for goods to be delivered from time to time to Howland, it would have been a continuing guaranty, because here is no limitation of the amount of goods to be sold, or of the credit to be given ; but the limitation is merely of the amount for which the guarantor will be at any time responsible. Such a contract imports a succession of dealings in the future without limit as to amounts. Of this character are the cases of *Bent v. Hartshorn*, 1 Metc. 24; *Hatch v. Hobbs*, 12 Gray, 447, and *Melendy v. Capen*, 120 Mass. 222. The case of *Boston & Sandwich Glass Co. v. Moore*, 119 id. 435, more nearly resembles the case at bar, though it so far differs that it cannot be said to be a decisive authority for the construction of this guaranty.

For these reasons we are of opinion that the learned justice of the Superior Court erred in ruling that the contract sued on is a continuing guaranty, under which the defendant is liable “beyond the first three hundred dollars’ worth of goods delivered by the plaintiff to said Howland.”

Exceptions sustained.

Peverly v. City of Boston.

PEVERLY V. CITY OF BOSTON.

(126 Mass. 305.)

Negligence — contributory — standing on bow of ferry-boat.

It is not necessarily negligent for a passenger on a ferry-boat to stand near the bow while the boat is landing. (*See note, p. 89.*)

ACTION for personal injury by negligence. The opinion shows the facts. The plaintiff had judgment below.

E. B. Hagar, for defendant.

F. S. Hesseltine and *W. H. Hart*, for plaintiff.

DEVENS, J. That there was evidence tending to show negligence in the arrangement or management of the gates on the boat from which the injury to the plaintiff was occasioned is not controverted by the defendant. It contends that the plaintiff has failed to show that he was himself in the exercise of due care; that a case of contributory negligence is thus presented which should prevent his recovery; and that the judge who presided at the trial was not justified in submitting the question to the jury. It is not necessary for the plaintiff to prove due care on his part by directly affirmative evidence; the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part in the circumstances under which the injury was received. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137.

The gates were originally provided with locks at the top, which fastened them together, and were further provided at the bottom with a bolt, handle, flange, and catch, by which they were there firmly secured. At the time of the accident, the locks at the top had been removed, and the catch on the bottom was not in working order, so that neither would operate to fasten the gates. How long they had been in this condition did not appear, nor did it appear that the plaintiff was aware of this deficiency in their fastening. He had seen the gates work, knew how they worked, and that there was danger if a man got against them, or put his hand upon them when they were being raised.

That which appears as to the plaintiff's conduct, as testified to by himself, does not show a want of due care such as should bar

his recovery, and it might fairly have been inferred from his description that he was in the exercise of it. That the plaintiff was desirous to be among the first to leave the boat, either to take the horse-cars or for any other purpose, would of course afford no excuse for negligently placing himself in any position of danger. He came out of the cabin, where there was room enough to stay, and passed into the front rank of those who had assembled in the passage leading from the cabin to the gates, so that there was no one between himself and them. He was desirous of getting as near the gates as he could without being injured. The guard-chain, which was attached to a post twenty-five and one-half inches from the gates, and intended to be hooked at an angle to a staple on the outside of the boat, by some accident was down, but the plaintiff stood back of it and over two feet from the gates. The injury occurred by the lifting of the gates, apparently by some unauthorized person, no servant of the defendant being there to operate them, and the sudden movement of the crowd which pressed the plaintiff against them while they were thus being lifted. That the place occupied by the plaintiff was not intended for passengers, and that they were to keep themselves confined in the cabins until the arrival of the boat, could not have been ruled. That the spaces between the cabins and the end of such boats, although unprovided with seats and only partially covered by a roof, are often occupied by passengers, without objection, during the transit of the boat, and as it approaches the shore, is a matter of common knowledge. It cannot be held, as matter of law, that they are to be deemed so unsafe that one standing there is guilty of a want of due care.

It was indeed held in *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429, on which the defendant relies, that a traveller by railroad cannot maintain an action against a railroad company to recover damages for a personal injury sustained by him in consequence of his voluntarily and unnecessarily standing upon the platform of a passenger car while the train is in motion. That case is limited in its application to modes of transportation such as were there considered, and to positions clearly not intended for passengers such as the plaintiff there occupied. *Maguire v. Middlesex Railroad*, 115 Mass. 239.

Whether the situation, arrangement and permitted use of the passageway, as it has been termed, were such as to authorize the

Peverly v. City of Boston.

plaintiff to stand therein in expectation of the immediate arrival of the boat, and whether, when there, he conducted himself with ordinary care and prudence, were questions to be decided by the jury. *Wheelock v. Boston & Albany Railroad*, 105 Mass. 203 ; *Barden v. Boston, Clinton & Fitchburgh Railroad*, 121 id. 426 ; *Worthen v. Grand Trunk Railway*, 125 id. 99. If he might properly stand in the passageway at all, the fact that he was in the front rank of the passengers was to be considered in connection with the distance at which they all stood from the gates. It would be impossible to say that because he was in this position, he was therefore legally guilty of negligence.

[Other questions omitted.]

The instructions as given were in conformity with well-settled principles, and the defendant has no just ground of exception to the refusal to rule as requested.

Exceptions overruled.

NOTE BY THE REPORTER.—To same effect, *Gannon v. Union Ferry Co.*, 29 Hun, 681. See also *Hawks v. Winans*, 42 N. Y. Super. 451 ; affirmed, 74 N. Y. 609.

In *Wyld v. Northern R. Co. of New Jersey*, 53 N. Y. 156, it was held not to be negligent in a passenger to leave his seat before the cars came to a stop on reaching his destination. The court said : “ There is no ground for imputing negligence to the plaintiff. It is probable that if he had retained his seat the injury would not have happened. He had no notice of danger, and had a right to assume that the train would be stopped in the usual manner. The train had reached its destination, and the plaintiff left his seat with a view of leaving the car as soon as the train stopped. He did, as passengers usually do, and what the company must have known they were accustomed to do, and the plaintiff could not have supposed that the act was inconsistent with safety. *Nichols v. Sixth Ave. Railroad*, 38 N. Y. 181 ; *Willis v. Long Island Railroad*, 34 id. 670 ; *Gee v. Metropolitan Railway Co.*, L. R., 8 Q. B. 161 ; 5 Eng. R. 160 ; L. T. Rep. 822.”

SNOW V. FITCHBURG RAILROAD COMPANY.

(128 Mass. 552.)

Negligence — railroad — throwing mail-bags.

One waiting on the platform, at a railroad station, for a train, and injured by a mail-bag thrown from a train passing at high speed, such throwing being customary and well known to the company, may recover of the company therefor. (*See note, p. 41.*)

ACTION for personal injury by negligence. The head-note shows the facts. The plaintiff had judgment below.

W. S. Stearns, for defendant.

J. T. Joslin and *G. A. King*, for plaintiff.

COLBURN, J. The plaintiff was a passenger on the railroad of the defendant, and properly on the platform at the station, waiting to make a necessary change from one train to another. There is no claim that she was in an improper place, or in any way wanting in due care. The plaintiff sustaining this relation to the defendant, and being in this place, the defendant was bound to exercise toward her such care and diligence as could reasonably be exercised to protect her from such injuries as human foresight could anticipate and prevent.

The defendant voluntarily furnished a car to run on its express train, from which it knew that mail-bags were to be thrown at the station where the plaintiff was, when the train was under full speed. Obviously unless good judgment and great care were used by the mail-agent in throwing out the bags, which had the momentum of a train moving at the rate of thirty miles an hour, or forty-four feet a second, danger was likely to result to passengers on the platform of the station.

There was evidence in the case tending to show that mail-bags had not unfrequently been thrown from this car, in such a way as to strike upon the platform where the plaintiff stood ; and if this evidence was believed, the court was justified in inferring that the defendant knew, or in the exercise of proper care, ought to have known this. It was within the power of the defendant to prevent

Snow v. Fitchburg Railroad Company.

this practice of throwing out mail-bags, if in no other way, by withholding the use of the car, or by stopping the train at the station. The case presented is unlike that of the act of a passenger, which the defendant had no reason to anticipate or power to prevent.

We are of opinion that the court was justified in refusing to rule, as requested by the defendant, that the plaintiff was not entitled to recover.

Exceptions overruled.

NOTE BY THE REPORTER.—In *Muster v. Chicago, etc., Ry. Co.*, Wisconsin Supreme Court, Nov., 1884, the mail-bag was usually thrown from the train about two hundred feet west of the depot, and there was no evidence that it had ever been thrown off at the depot prior to the occasion in question. *Held*, that the railroad company was not chargeable with notice that it was likely to be thrown off at the depot, and hence was not bound to guard, by notice or otherwise, against an injury to one of its employees, resulting from its being thrown off there. Also that the running of a mail train at the rate of thirty or thirty-five miles per hour past a station is not, of itself, unlawful; nor can negligence be imputed to the railroad company from that fact alone, so as to make it liable for an injury resulting from the throwing of a mail-bag from such train. The court said:

“We do not understand counsel as claiming that the railway company is liable for the negligent act of the postal employee, if it is otherwise free of negligence contributing to the injury of the plaintiff. Such a claim, if made, could not be sustained. The government compels the company to carry the mails, and designates the trains upon which the same shall be carried. It prescribes the kind of cars which shall be provided, and appoints clerks and agents to take exclusive charge of mails on the trains, and to receive and discharge the same. Such clerks and agents are paid by the government, and are answerable only to the government for the manner in which they discharge their duties. The railway companies upon whose trains such duties are performed have no control whatever over them, and it would be just as absurd to hold one of these companies responsible for the negligent acts of such government employees which it had no means of preventing, as to hold the company responsible for the negligent acts of passengers on their trains committed under like circumstances. We conclude that the mere act of the postal employee in throwing off the mail-bag at the depot, conceding it to have been a negligent act, was not negligence on the part of the railway company.

“But it is maintained that the train was propelled past the depot where the plaintiff was injured at an unreasonable rate of speed, which contributed to the injury, and hence the defendant is liable for such injury, although not responsible for mail-bag being thrown off at that point. It is probable that but for the momentum of the train the accident would not have happened. Yet it does not necessarily follow from this that the defendant is liable therefor. To render it liable some negligent or unlawful act on its part must be shown. It is said that the plaintiff did not know that this train passed the depot at such great speed; and in view of the fact that the mail-

Snow v. Fitchburg Railroad Company.

bag might be thrown off there, and the scaffold on which he was at work thrown down thereby, the railway company should have informed him of the peril, and was negligent because it did not. This point is not well taken. All the evidence on that subject is to the effect that the mail-bag was usually discharged near the mail-catcher, which was two hundred feet west of the depot, and there is no testimony whatever that it had ever before been thrown off at the depot. The company is not chargeable with notice that it was likely to be thrown off at the depot, and hence was not required to guard, by notice or otherwise, against an accident to the plaintiff resulting from its being thrown off there on the occasion in question. * * *

“ It cannot be successfully maintained that a speed of thirty or thirty-five miles per hour through and past Greenfield station is, of itself, an unlawful rate of speed. This train No. 3 was the fastest train on that line of railway. Doubtless that was one reason why the department required the railway company to carry the mails on it. It is within the common knowledge and observation of men in general that fast mail and express trains on the great trunk lines of railway throughout the country are habitually and usually run at a much higher rate of speed ; yet no one would impute negligence to the railway companies on that fact alone. To render such rate of speed unreasonable, some other circumstance or condition must be shown to exist, calling for a reduction of speed, a disregard of which would be inconsistent with reasonable care.”

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

SHEALY V. EDWARDS.

(73 Ala. 175.)

Sale — when title passes.

A stock of goods, old and new, was sold, the new at invoice prices, the old at prices to be agreed on at a fixed time, the purchaser giving his notes for the estimated price of the whole, to be increased or diminished according to the eventual agreement as to the old goods. The goods were delivered. Before any agreement as to the price of the old goods a creditor of the seller attached the goods. *Held*, that title had passed and the creditor got no lien.

TRESPASS. The opinion states the facts. The defendant had judgment below.

Heflin, Bowden & Knox and Parsons & Parsons, for appellants.

Bradford & Bishop, contra.

SOMERVILLE, J. The sole question presented is whether the alleged sale made by Terrell & Vincent of their stock of merchandise to the appellants, Shealy & Finn, was complete at the time the defendant Edwards, as sheriff of Talladega county, levied the attachment in favor of Hardie, which occurred on December 12, 1881. If so the property in the goods had at this time passed to the vendees, and

they were no longer liable to be attached under legal process against the vendors.

The principle is often stated to be that "if any thing remains to be done by either party to the transaction, before delivery — as for example to determine the price, quantity or identity of the thing sold — the title does not vest in the purchaser, but the contract is merely executory. *Allen v. Maury*, 66 Ala. 10; Chit. Contr. 299.

There seems to be no objection to this as a general proposition, but it must be limited to those cases where the evidence does not show an intention to make the sale absolute and complete without any regard to the performance of these usual prerequisites, at least as to price and measurement. This rule, as suggested by SHAW, C. J., in *Sumner v. Hamlet*, 12 Pick. 76, 82, applies only to "cases of constructive delivery and constructive possession; and the rule is resorted to only for the purpose of determining when the contract of sale is so far complete as to pass the property, according to the intent of the parties in the contract." We take the true rule to be as now established that if the goods are sufficiently identified a complete sale of them may be made without fixing an absolute price, if such be the clear intention of the parties, as legally evinced by the circumstances attending the sale.

This would seem a reasonable rule according to the principles of analogy adopted in all other cases. In the construction of contracts generally, it is a first and pervading principle that the intention of the parties must govern, unless that intention contravenes some established principle of law. The same rule is equally dominant in construing wills. The primary purpose is to ascertain the intention of the testator. We deem it of paramount importance in construing contracts of sale — a subject which is still involved in much confusion, notwithstanding the vast resources of learning expended upon it by the jurists and law writers of the past century. This confusion is manifest in the two converse propositions, stated by Mr. Parsons, each of which is obviously true: "If the property passes, then it is a completed sale, and if a completed sale, then the property passes." 1 Pars. Cont. 440. Hence we sometimes have the unsatisfactory test applied, as to whether or not the goods in case of loss by fire would be at the risk of the seller or buyer, thus presenting, as suggested by Mr. Hilliard in his work on Sales, a clear instance of the logical fallacy of a mere *petitio principii*, or begging of the question. Hilliard Sales, p. 55, § 2.

Shealy v. Edwards.

The same writer in discussing the particular subject under consideration — that of intention and delivery in the sale of personal property—states the general doctrine to be, that “where any thing remains to be done by the seller of goods, as between him and the purchaser, before delivery, the latter acquires no complete present right of property ; at least without an affirmative proof of an intent that he shall acquire such property.” “The rule,” he concludes, “is held to apply where either the property or price is unsettled.” Hilliard Sales, p. 190, ch. 9, § 1.

Mr. Addison, in his work on Contracts holds the same doctrine. After stating the general rule, as to the necessity of fixing the price and other prerequisites in executory sales, he observes : “Moreover if it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass although the goods have still to be weighed, measured or tested, provided the subject-matter of the sale is ascertained and identified ; and there may be a complete contract so as to pass the property in the goods, although the price has not been definitely agreed on, or although the goods are still unfinished or unweighed.” He cites numerous cases in support of these several propositions.

Mr. Benjamin asserts it to be an unquestionable rule of law, that even in executory contracts of sale, where no price is fixed for the goods sold, the vendor is entitled to recover against the buyer for not accepting the goods. Benj. Sales, § 85; *Hoadley v. McLaine*, 10 Bing. 482. So he says that if the price is to be fixed by agreement of appraisers or of the parties, and the contract is in other respects executory, there is no sale without such agreement. “But if the contract has been executed by the delivery of the goods, the vendor would be entitled to recover the value estimated by the jury, if the purchaser should do any act to obstruct or render impossible the valuation.” Benj. Sales, § 87; *Clarke v. Westrope*, 18 C. B. 765; *Wittskowsky v. Wasson*, 71 N. C. 456.

In *Boswell v. Green*, 1 Dutch. 390, the same question arose and was decided in accordance with these views. It was there held that the property to the goods could pass although they had not been measured, or the aggregate price ascertained. “Where it is clear by the terms of the contract,” it was said by the court, “that the parties intended that the sale should be complete before the article sold is weighed or measured, the property will pass before this is done.”

The case of *Macomber v. Parker*, 13 Pick. 175, cited by appel-

lant's counsel, was a case not unlike the present in some of its most important features. After laying down the general principle as stated in *Allen v. Maury*, 66 Ala. 10, the court say: "But where the goods or commodities are actually delivered, that shows the intention of the parties to complete the sale by delivery, and the weighing or measuring, or counting afterward would not be considered as any part of the contract, but would be taken to refer to the adjustment of the final settlement as to the price. The sale would be as complete as a sale upon credit before the actual payment of the price."

The actual delivery of the goods is of the greatest importance as evincing an intention to pass the property so as to complete the sale. It was held by this court in *Morgan v. Smith*, 29 Ala. 283, that the delivery of a bill of sale of personal property *per se* transferred the property in the absence of countervailing circumstances, and such is the settled doctrine. Delivery is often said to be the primary and immediate duty of a vendor after the contract of sale is completed. The chief purpose is generally to effect a transmutation of property, and if unaccompanied by explanation the purchaser generally has a right to regard it as absolute. *Benj. Sales*, § 674; *Upton v. Sturbridge Mills*, 111 Mass. 453. If there be accompanying declarations, showing an intention to pass the property to the vendee as in this case immediately and not at some future time, the fact of delivery, as evidence of intention, becomes manifestly the most cogent of all legal proofs where the good faith of the transaction is not impugned for fraud.

The rule as to price in executory contracts of sale is generally said to be, that it must be certain, or capable of being made certain. Such is undoubtedly the settled doctrine, and although in such case, if the agreement be that it is to be fixed by arbitration, the sale must be considered void if the arbitrators fail to agree, a different principle prevails where the contract of sale is complete and executed. In the latter class of contracts, where the seller, whether by actual delivery or other like unequivocal act, intentionally passes the property in specific goods to the purchaser without fixing the price, the law leaves the price to be adjusted by the agreement of the parties, or if they fail to agree, by the verdict of a jury. If such price is left open for future adjustment by consent, the property being delivered with the expressed intention to complete the sale, the price to be agreed on is implied to be one that is fair and rea-

Shealy v. Edwards.

sonable, and this is always the rule of recovery on a *quantum meruit*, or *quantum valebat*. If there should or can be no mutual consent, the implication follows as part of the original contract of sale, that a jury will adjust it, just as manifestly as in every day sales and delivery of goods by merchants on open account, where the price is very often not adjusted for months afterward. *Benj. Sales*, § 87 ; *Valpy v. Gibson*, 4 C. B. 837 ; *Macomber v. Parker*, 13 Pick. 175.

The present case is a stronger one than the above rules would seem to require, in order to constitute an absolute and complete sale. The goods were actually delivered by the sellers to the purchasers. The delivery was accompanied by a declaration of the sellers, showing an intention to pass the property to the purchasers. "Now the goods are yours." The purchasers took possession and exercised dominion over the property as their own, continuing the sale of the goods on their own account during an entire day before the levy of the writ of attachment. The notes of the purchasers were given for the estimated price of the goods which aggregated a fixed sum, \$2,750. It is true that it was agreed that this price should be changed, being more or less according as the actual valuation of the goods might be fixed by the contracting parties on the Monday following the transaction, and it never was fixed because of the interruption occasioned by the levy of the attachment. We are clear in the view that these facts without any rebutting circumstances would constitute an executed contract of sale.

There is evidence in the record which tends to impugn the good faith of the transaction, but the question of fraud is not raised by any ruling of the court or assignment of error.

The rulings of the court excepted to were not in accordance with the views expressed in this opinion, and the judgment must therefore be reversed and the cause remanded.

Judgment reversed.

HILL V. FREEMAN.

(78 Ala. 200.)

Deed — consideration — illicit intercourse.

A deed executed and delivered in consideration of future illicit intercourse, the grantees being in possession, vests title. (*See note, p. 49.*)

EJECTMENT. The opinion shows the point.

Heflin, Bowden & Knox, for appellants.

G. C. Ellis and *Bradford & Bishop*, contra.

SOMERVILLE, J. We understand it to be a first principle, not now to be assailed or even doubted, that where a contract, based on a consideration contrary to law, immoral, or opposed to public policy, has been fully and voluntarily executed, if the parties are *in pari delicto*, the courts will not interfere to disturb the acquired rights of either at the instance of the other. The result is the same as if the contract had originally been legal and valid, and neither can recover the consideration which he has thus voluntarily parted with. Bish. Cont., §§ 140, 432; *Morris v. Hall*, 41 Ala. 510, 536; *Boyd v. Barclay*, 1 id. 34; *Black v. Oliver*, id. 449; *Jacobs v. Stokes*, 12 Mich. 381; *Burt v. Place*, 6 Cow. 431; *Liness v. Hesing*, 44 Ill. 113; 1 Story Cont., § 543; 1 Add. Cont., § 303; *Williams v. Higgins*, 69 Ala. 517.

It is of course settled that all illegal executory contracts are void, and no court will permit its aid to be invoked for their enforcement. Bish. Cont., § 458; 1 Add. Cont., § 251 *et seq.*; *Ware v. Jones*, 61 Ala. 288. In *Shiffner v. Gordon*, 12 East, 304, Lord ELLENBOROUGH declared it to be a settled rule that "when a contract which is illegal remains to be executed, the court will not assist either party in an action to recover for the non-execution of it."

The present case manifestly falls within the first principle above enunciated. It is that of an executed contract in which nothing remained to be done by either party. Conceding that the deed from John Hill to the appellee was executed in consideration that one of the grantees would live with him in a future state of illicit intercourse or concubinage, the title of the land conveyed nevertheless passed

Hill v. Freeman.

to the grantees, and being in possession under their deed, they cannot be dispossessed by the heirs of Hill, who can have no greater claim or right than the deceased grantor had. It is plain that such a contract, if unexecuted, could not be enforced in any court. Such was the ruling of this court in *Walker v. Gregory*, 36 Ala. 180. But the deed being executed and delivered, and the grantees being in possession, ejectment will not then lie to dispossess them. The maxim applies, *in pari delicto potior est conditio possidentis*.

There was no error in excluding the evidence offered by appellants, as the illegality of the consideration upon which the deed was based was immaterial.

The judgment is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Clark v. Colbert*, 67 Ala. 92, the court said: "There can be no question that the composition of the felony, and the dismissal of the prosecution for a valuable consideration, was a highly penal offense, and that all who aided and abetted in its perpetration were participants in the guilt. Any executory contract, or promise based on such consideration, is illegal, and no suit can be maintained for its enforcement. *Ex turpi causa, non oritur actio*. No one can recover, who, to establish his claim, must trace his right through such illegal transaction. This is common knowledge. Courts can give no sanction to such flagrant violations of the law. Add. Cont., § 258; 1 Brick. Dig. 881; *Collins v. Blantern*, 1 Smith. Lead. Cas. [161] and English notes; Benjamin Sales, §§ 503-4. The present case arises however not on an executory, but on an executed contract. The plaintiffs seek to regain property which they conveyed away by deed, on the ground that the consideration was illegal—a violation of positive law. *Walker v. Gregory*, 36 Ala. 179, was a suit to recover slaves which had been conveyed to the plaintiff on an immoral consideration. To establish her cause of action, she was forced to rely on the contract, which was founded on such illegal consideration. This court held she could not recover. It was added, that if she had been in possession of the slaves, and the administrator had sought to recover them from her by suit possibly she might have protected herself under the maxim, *potior est conditio possidentis*. *Denton v. English*, 2 Nott & McC. 581, holds that an executed contract, founded on an immoral consideration, is binding on the parties. In *Gray v. Roberts*, 2 A. K. Marsh. 208, the court said: 'If both parties are equally guilty of a breach of the law, a court of justice cannot interpose its aid in behalf of either, for it is a settled rule, that *in pari delicto potior est conditio defendentis*.' S. C., 12 Am. Dec. 883. In *Waite v. Merrill*, 16 id. 238 (4 Greenl. 102), it was held that money paid on an illegal contract, voluntarily, knowingly, cannot be recovered back. The case of *Inhabitants of Warrenton v. Eaton*, 11 Mass. 368, is not distinguishable from this. The court, PARKER, C. J., said; 'If then the composition of a felony, or of a larceny, is an illegal consideration of any promise or obligation for money, the party claiming un-

der such instrument cannot enforce it in a court of justice; nor, can the other party, if he has paid it, recover it back again. There must then be a distinction between a conveyance of land, and money paid on such consideration, or Betsy Flagg [the grantor] could not, on this ground, avoid her deed by entry or action, so as to convey any title to the demandants. Such a distinction was attempted in the argument, but we find no foundation for it. A deed of bargain and sale, signed, sealed, delivered, acknowledged and recorded, is an actual transfer of the land to the grantee, as much as the delivery over of a sum of money, or of a personal chattel, is a transfer of those.' In *Myers v. Meinrath*, 101 Mass. 867; s. c., 8 Am. Rep. 168, it was said, 'the policy of the law is to leave the parties in all such cases without remedy against each other.' In 1 Story Eq. Jur., § 298, is the following language: 'In general (for it is not universally true), where parties are concerned in illegal agreements, or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participation in a common crime, will not at present interpose to grant any relief; acting upon the known maxim, '*in pari delicto, potior est conditio defendentis et possidentis*.' Pursuing this subject in the note, it is said: 'I say at present, for there has been considerable fluctuation of opinion, both in courts of law and equity on this subject. The old cases often gave relief, both at law and equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort.' In the leading case of *Collins v. Blanton*, published in 1 Smith Lead. Cas. [158], is this strong language: 'This is a contract to tempt a man to transgress the law, to do that which is injurious to the community; it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this; no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid, in pursuance thereof, he shall not have the help of a court to fetch it back again. You shall not have a right of action, when you come into a court of justice in this unclean manner, to recover it back. *Procul, O! procul, este profani*.' And the American annotators, after reviewing American decisions bearing on the question, employ this language: 'It is proper to say, in taking leave of this brief notice of an important and difficult subject, that the law will leave all who share in the guilt of an illegal or immoral transaction where it finds them, and will neither lend its aid to enforce the contract while exocutory, nor to rescind it and recover back the consideration when executed.' We adopt this language as our own, and hold that under the facts shown in this record, plaintiffs cannot recover. *Black v. Oliver*, 1 Ala. 449."

See *Marksbury v. Taylor*, 10 Bush, 519, holding that an executed contract based upon illicit sexual commerce cannot be set aside at the instance of the grantor or his heirs-at-law, who cannot occupy in court a better position than their ancestor through whom they claim.

In *Gisuf v. Neval*, 81 Penn. St. 356, a man seduced a female and induced

Seals v. Edmondson.

her to submit to an operation for abortion, resulting in her serious sickness, and suffering. After her recovery he said he would buy her a house for what she had suffered for him. She contracted for a house, he gave her the purchase-money, and she paid for it before and at the time the deed was delivered to her. *Held*, that no trust resulted to him, by his furnishing the purchase-money. The court said: "That 'an immoral consideration will never support a contract,' as was said by the learned judge of the court below, in that portion of his charge contained in the sixth specification, is doubtless true as an abstract proposition. But it has no application to this case. The defendant is not seeking to enforce such a contract. The contract, so far as one existed, has been fully executed. This is the case of a man who has wronged a woman, who has made her a compensation for that injury, and who now seeks to recover it back. In this the law will not help him. As he has sown, so must he reap."

To the same effect, *Ayerst v. Jenkins*, L. R., 16 Eq. 275; s. c., 6 Moak. Eng. 756, where SELBORNE, L. Ch., said: "The voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while its object is yet unaccomplished, a gift intended as a bribe to iniquity. * * Lord ELDON asked whether there had been any case upon the distinction between a recompense for past, and a provision for future cohabitation, 'where the court, finding the woman in actual possession of the property, has upon that ground had it taken out of her hand? The distinction, he added, 'upon the doctrine of *premium pudicitiae*, has prevailed in the case of restraining her from enforcing a security. But I doubt whether there is any instance of taking the property out of her hands, except as to creditors.'"

SEALS V. EDMONDSON.

(73 Ala. 205.)

Contract — implied — services.

The owner of a few of a large number of bales of cotton stored in a burning warehouse, having saved a part of the cotton, declaring at the time that if he could not hold it under the law, he would surrender it on being paid for his labor and expense in saving and baling it, and the warehouseman, with knowledge of the services and of the terms on which they were being rendered, having assented thereto or acquiesced therein, *held*, a contract entitling the person rendering the services, the cotton not being identified as his own, to payment for his labor and expense, and to its possession until he was paid.*

* See *Woods v. Ayres* (39 Mich. 345), 33 Am. Rep. 896.

ACTION to recover cotton. The head-note shows the facts.

Watts & Sons, for appellant.

G. L. Comer, contra.

STONE, J. This is a statutory action for the recovery of chattels in specie, very like the common-law action of detinue. On all questions material to be here inquired into, it is governed by the same rules as those which obtain in the action of detinue. In fact, it is the common-law detinue, with some statutory additions. One controlling principle, in this form of action, is that to maintain it, the plaintiff must have, as against the defendant, a present, unqualified right to the possession of the chattel, in its present form. If there be any preliminary act, or condition precedent to be performed, before the unqualified right of possession attaches, then detinue cannot be maintained. 1 Brick. Dig. 572, §§ 6, 8, 9.

The testimony showing the circumstances under which the appellant gathered up and baled the waste cotton, left by the fire, is neither very clear nor very harmonious. One phase of the testimony, at least, tends to show that appellee, plaintiff below, was present and cognizant of the services being rendered by appellant in saving the cotton; that appellant stated he intended to hold the cotton for himself, if he could; and if he could not hold it under the law, then he would surrender it on being paid for his labor, trouble and expense in saving and baling it; that appellant and the attorney of the insurance companies, interested in the saving of as much as nine-tenths of all the cotton destroyed by the fire (some 700 bales), agreed to these terms; that both appellant and the said attorney informed plaintiff, appellee of this agreement, and that he expressed no objection. The law frequently implies contracts from the conduct of parties. If one perform useful services and works for another, of a character that is usually charged for, with the knowledge of that other, and he express no dissent, or if he avail himself of the services, then the law implies a promise to pay for such services what they are reasonably worth. And assent is sometimes implied from silence. When the conduct of the parties is ambiguous, or the testimony conflicting, it is always a question for the jury to determine whether or not there was a mutual agreement or understanding. No matter what of dissent plaintiff may have

Seals v. Edmondson.

first expressed, if he finally, while the work was progressing, acquiesced in appellant's offer, if he made it, that if he, appellant, could not hold the cotton under the law, then he was to be paid for his expense, labor and services incurred and employed in saving and baling the cotton, this constitutes a contract. On the other hand, if appellee objected to the services tendered and performed by appellant, and did not afterward expressly or impliedly assent to the terms proposed, if terms were proposed, then there can be no proper finding that there was a contract to pay appellant for his services and expenses. No man, except in specially exceptional cases, can be made another's debtor against his will. This is a question peculiarly for the jury, under the rules above declared.

If the jury find there was an express or implied agreement, such as is referred to above, then plaintiff, appellee, did not have a present, unconditional right to the four bales of cotton. To give him such right, he must have paid or tendered to the appellant the value of the labor and expense he had bestowed in and about saving and baling the cotton. If under the rules above there was no agreement, express or implied, to pay for the labor and expenses, then no payment or tender was necessary. Appellant could not force appellee to become his debtor. If the jury find there was such agreement to pay, express or implied, then plaintiff cannot maintain detinue on the proof in this record. He must bring some other action, or show payment or tender before action brought of appellant's proper charges.

The testimony in this case did not authorize the general charge on its effect. It was neither very clear, nor free from conflict. The objection that the record fails to show the court was requested, in writing to give this charge, is without merit. We presume the court did its duty and obeyed the statute. 1 Brick. Dig. 335, §§ 2, 3, 4, 5.

The plaintiff, having the lawful possession of the cotton as warehouseman, had such a qualified right to it as that in the absence of other facts he could sue and recover against one found in possession of it, and not showing a better title. The fact that appellant owned twelve of the seven hundred and fifty bales that were in the warehouse when it was burned, waste cotton enough to make fourteen bales only being saved, did not of itself tend to prove that any part of the four bales saved by him contained any of his cotton. The possibilities are too remote, and the chances too uncertain, to be made the basis of judicial action. *Reversed and remanded.*

Montgomery & Eufaula Railway Company v. Kolb.

MONTGOMERY & EUFAULA RAILWAY COMPANY V. KOLB.

(73 Ala. 326.)

Carrier — delivery to — custom — rules.

A deposit of cotton in a street along the side of the platform of a railroad depot, or in the railroad cotton-yard, for shipment, in pursuance of a custom or usage adopted or sanctioned by the depot agent, may amount to a delivery to the railroad company, although no receipt is given by the agent to the shipper, and such usage or custom is contrary to the established regulations of the company, known to the shipper, and no notice thereof is traced to the superintendent or managing agent of the company.*

ACTION for goods intrusted for carriage. The head-note shows the point. The plaintiff had judgment below.

John D. Roquemore, for appellant.

G. L. Comer, contra.

STONE, J. When the law has declared certain express rules for the government of men, or when persons enter into express stipulations, expressing the terms on which they enter into contracts, it is a reasonable rule, subject only to a few exceptions, that neither custom nor usage will be allowed to dispense with such legal requirements or such express stipulations. *Barlow v. Lambert*, 28 Ala. 704. "Where by local custom or usage, provincialisms and technicalities of science and commerce, and perhaps some others, have acquired a known, fixed and definite meaning, different from their ordinary import; or where such technicalities, unexplained, are susceptible of two or more plain and reasonable constructions, it is certainly competent to prove the existence of such custom, as a means of showing the sense in which the contracting parties intended to be understood." *Barlow v. Lambert*, 28 Ala. 704. See also the many authorities referred to in the briefs of counsel. Speaking of usage of trade, Mr. Greenleaf, Ev., vol. 2, § 251, says: "It is sufficient if it be established, known, certain, uniform, reasonable, and not contrary to law. * * * Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the

* See *South, etc., R. Co. v. Wood* (71 Ala. 215), 46 Am. Rep. 309.

Montgomery & Eufaula Railway Company v. Kolb.

nature and extent of their contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of a doubtful and equivocal character; and to fix and explain the meaning of words and expressions of doubtful or various senses. On this principle, the usage or habit of trade or conduct of an individual, which is known to the person who deals with him, may be given in evidence to prove what was the contract between them." This latter principle may be illustrated by a familiar incident in every-day life. A customer is in the habit of dealing with his merchant, and having his purchases sent home, and his bills run from one to two months before payment is demanded or expected; and this too at cash rates. He selects a given article of merchandise, and orders a given number of yards to be measured off. In this there is not a word said about price, about delivery, or about the time of payment. Yet there is implied in these few simple and indeterminate words and acts, that the goods are sold at their customary cash market value, that they will be delivered at the purchaser's residence without undue delay, and that payment will not be expected, until the end of the customary indulgence. So, in *Boon v. Steamboat Belfast*, 40 Ala. 184, quoting from Judge STORY, this court said: "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character."

In September, 1877, Raoul, superintendent of the South Western Railroad Company, of Georgia—which company was also operating the appellant railroad company—issued a circular, headed "Notice to cotton shippers and instructions to agents." This notice or circular was again issued at the opening of the season of 1880–1881, and was forwarded to, and received by the agent at Eufaula, and a copy was furnished to the appellees, Kolb & Hardaway. Kolb & Hardaway were cotton buyers at Eufaula, did a considerable business, and made many shipments of cotton by the appellant railroad company. This suit was brought to recover the value of nine bales of cotton, alleged to have been delivered to the railroad company at Eufaula, to be transported to, and delivered at Montgomery, and never delivered. The case turned on the question of delivery to the railroad company at Eufaula; for it is not

Montgomery & Eufaula Railway Company v. Kolb.

pretended the railroad company forwarded the cotton, or delivered it at Montgomery. In fact neither the railroad company nor its agent at Eufaula gave any receipt for the cotton alleged to have been lost. There was no express contract fixing the terms.

We have carefully examined the circular, made a part of the bill of exceptions, and we think its regulations and directions are reasonable. They are alike beneficial to the shipper and carrier. They commend themselves by their wise and systematic provisions, intended to secure prompt shipment, to prevent confusion of goods, and to render disputes about delivery for shipment almost impossible.

It is not pretended that those regulations were conformed to in this case. The claim is, that the railroad company departed from its own regulations, and thus established a usage different from them, which was conformed to in this case. The bill of exceptions recites that "the evidence further tended to show that shortly after the printed 'notice to cotton shippers and instructions to agents' were issued, they were disregarded by both shippers and defendant's agent at Eufaula, and that it became a general custom and usage to deliver and receive cotton at the depot in Eufaula in disregard of such printed notice and instructions. The evidence on this subject was very conflicting, the agent himself testifying that he never received cotton for shipment in non-compliance with said instructions, except in a few instances made necessary by what he thought an exigency and as a matter of accommodation to the shipper." In another place the bill of exceptions states: "The proof further showed that some of the cotton brought to the cotton-yard of defendant by the plaintiffs for delivery to the defendant for shipment was not placed by plaintiffs on a certain plank platform of defendant's, upon which defendant required all cotton bales to be placed before it would receive and receipt for them, but was placed in a street running along the side of such platform; but testimony was introduced by said plaintiffs, going to show that the station agent did take cotton bales from this street and receipt for them." In another place in setting out testimony it is said, "that plaintiffs frequently and persistently violated these rules and regulations of the defendant company as contained in such 'notice to cotton shippers and instructions to agents,' against the protest of the station agent at Eufaula." It is nowhere shown that the station agent ever did refuse to receive and ship cotton that was

Montgomery & Eufaula Railway Company v. Kolb.

delivered for shipment, because not delivered in conformity with the printed rules and regulations.

It is contended for appellant that inasmuch as the station agent had positive instructions from the superintendent not to receive or receipt for cotton to be shipped, unless delivered in accordance with the printed directions, and inasmuch as the shippers in this case had notice of these regulations by receiving a copy thereof, then, not having received the agent's receipt for the cotton, they have shown no legal delivery to the railroad and cannot recover. Such is undoubtedly the law if the testimony stopped here. Against this it is replied for appellees, that the railroad company, through its agent at Eufaula, has permitted a usage to grow up which dispenses with the regulations prescribed in the circular, and constitutes the act done in this case a legal delivery to the railway company. To this it is rejoined that no knowledge of such violation of the regulations is traced to Raoul, the superintendent, and hence the railroad company is not bound by such usage if proven to have been established.

We think this is too narrow a view of the question. Railroads usually have extended lines, and along those lines are many depots or stations at which the business of receiving and delivering freight is carried on. The trading public, as a rule, have no access to the superintendent, and can only know the station agents with whom they have dealings. They can have no control of the business regulations of the railroad, and have no power of appointment or removal. Whatever regulation, custom or usage such station agent adopts, or permits to be adopted, the public must either conform to or will feel itself justified in conforming to. The rules observed by shippers in their general transactions, if continuous or frequent, although not universal, grow into a usage which would authorize others to treat it as the proper rule and as an element of the contract of affreightment. This constitutes the very spirit, the intent of a usage of trade. It supplies by implication an unexpressed fact, or link in the chain of facts, which go to make up and prove the contract. And we think it no answer to this that no testimony was offered of this violation of instructions on the part of the agent, tending to trace notice of it to the superintendent. It was the duty of the corporation to keep itself informed of the manner in which its station agents conducted their agency, their habit, or usage in the matter of receiving and delivering freight; and we

Montgomery & Eufaula Railway Company v. Kolb.

think it would be highly detrimental to the public service if we were to permit a railroad corporation to escape responsibility for the consequences of a usage which its own trusted agents had permitted to grow up and be acted upon. *Piedmont & Arlington Ins. Co. v. Young*, 58 Ala. 476 ; s. c., 29 Am. Rep. 770. There was sufficient testimony to justify the court below in submitting to the jury the inquiry whether or not there was a usage at the Eufaula depot of the defendant railroad company to dispense with the regulations prescribed in the superintendent's circular. It will be remembered there was testimony tending to show there had been a frequent if not general disregard of those regulations commencing soon after they were issued, a period of more than three years before the loss complained of in this case. That is certainly a sufficient time to establish a usage of trade. True, the testimony was in conflict as to the frequency and extent of the violation. The question, which phase of the evidence was the true one, was for the jury.

As we have said, the question in this case is, was there, or was there not a delivery of the cotton to the railroad. In *Hutchinson on Carriers*, § 90, is this language : "While it is the undoubted general rule that the delivery, to bind the carrier, must be made either to him or to some one with authority from him or who may be rightly presumed to have such authority, it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage or by a particular course of dealing between them. * * * If therefore the parties agree that the goods may be deposited for transportation at any particular place, and without any express notice to the carrier, such deposit will be a sufficient delivery ; and proof of a constant and habitual practice and usage of the carrier to receive the goods when they are deposited for him in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties by which the goods, when so deposited, shall be considered as delivered to him without any further notice. Such a practice and usage are tantamount to an open declaration, a public advertisement by the carrier, that such a delivery should of itself be deemed an acceptance by him ; and to permit him to set up, against those who had been thereby induced to omit

Warwick v. State.

it, the want of the formality of an express notice which had been thus waived, would be sanctioning injustice and fraud." Now it seems to us this is a clear statement of the principle and the ground on which it rests. See also Hutch. Carr., § 91.

[Minor matters omitted.]

Affirmed.

WARWICK V. STATE.

(73 Ala. 486.)

Criminal law — appeal by escaped prisoner.

The appeal of an escaped prisoner will be dismissed.*

MOTION to dismiss appeal. The opinion states the case.

H. C. Tompkins, attorney-general, for motion.

Watts & Sons, contra.

SOMERVILLE, J. In November, 1883, the defendant was convicted of the crime of murder in the first degree, for which he was sentenced to the penitentiary for life. The present appeal is prosecuted from this judgment, and since the filing of the transcript it is made to appear to the satisfaction of the court, that the accused has unlawfully escaped from the custody of his jailer, and is now a fugitive from justice. The motion is made by the attorney-general, on behalf of the State, to dismiss the appeal, unless the defendant submit himself to the jurisdiction of the court by returning to custody, by the next ensuing term.

The court is unanimous in opinion that the motion is one eminently fit to be granted. This is upon a principle which is one of almost universal cognizance, that a writ of error, or appeal, will not be heard in criminal cases, when the party suing it out has escaped from the jurisdiction of the court. Whart. Cr. Pl. & Pr. (8th ed.), § 774 *a*.

This rule of procedure is so manifestly reasonable in its requirements as scarcely to need argument for the vindication of either its

* To same effect, *Sargent v. State*, 96 Ind. 63.

wisdom or its justice. A prisoner who is in the custody of the law, and is under its sentence, brings himself in an attitude of contempt, when he unlawfully escapes from such custody and defies the authority of both the court and of the law. By breaking loose from his jailer and fleeing from the jurisdiction, it is not unreasonable that he should be adjudged to have waived, at least for the time being, his right to be heard, either by himself or his counsel. There is no rule of law which requires of courts that they should go through the empty and useless form of doing a nugatory thing. It would be a legal mockery to sentence one to be hanged who had fled the State and was beyond the seas. This is not upon the theory that the personal appearance of the accused in the appellate court is necessary to confer jurisdiction—a rule of the common law which does not prevail either in this, or perhaps in any of the other American States. Arch. Cr. Pl. & Pr. (Pomeroy) 622, *note*. It rather grows out of the fact that the necessary basis of all criminal proceedings is the condition precedent, that the accused must be in the custody and under the control of the court, either actual or constructive, before such tribunals of justice will undertake to sit in judgment upon questions involving his life or liberty. It is repugnant to every just conception of judicial proceedings, in the decent and orderly administration of justice, that the accused should occupy an attitude enabling him to accept or reject the judgment of a court, according as it may coincide or conflict with the selfish promptings of his own option. Such a practice would be fraught with much of the evil resulting from the iniquitous conception of permitting a criminal to sit as judge in his own case.

In *Smith v. United States*, 94 U. S. 97, it was very recently held to be clearly within the discretion of the appellate court to refuse to hear a criminal cause in error, when the convicted party had escaped. It was said by Chief Justice WAITE, speaking for the United States Supreme Court: “If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it, and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances we are not inclined to hear and decide what may prove only to be a moot case.”

The same view is taken in *McGowan v. People*, 104 Ill. 100; s. c., 44 Am. Rep. 87, where it was held to be the better practice, that “the cause shall not proceed to a hearing when the persons to be affected are not within the jurisdiction of the court to answer

Warwick v. State.

its judgment, but are in the attitude of fugitives from justice." While the personal presence of the accused in the appellate court was deemed entirely unnecessary, it was declared that "it would be idle for the court to proceed to determine the question presented, when the possibility of enforcing whatever judgment it might pronounce must depend upon the option of the fugitives to return into custody, or upon the remote chances of their ultimate recapture by the officers of the law."

In *People v. Genet*, 59 N. Y. 80; s. c., 17 Am. Rep. 315, where the accused, after being convicted of a felony, made his escape, the New York Court of Appeals declined to hear an application for a mandamus to compel the sealing of a bill of exceptions taken by him. The reason given was, that a prisoner cannot be permitted to take any action, or to be heard in a criminal proceeding, after his escape from custody, so long as he remains at large. This ruling was not based on any statutory regulation, but was held to be a general rule of our criminal jurisprudence. "The whole theory of criminal proceedings," says the court, "is based upon the idea of the defendant being in the power and under the control of the court in person." It was added that, "in criminal cases there is no equivalent to the technical appearance by attorney of a defendant in civil cases, except the being in actual or constructive custody."

In *State v. Conners*, 20 W. Va. 1,* a like conclusion was reached after a general review of the authorities on this subject; the court announcing it to be clear, both upon principle and authority that the motion made by the attorney-general to dismiss the cause should be sustained. It was said that the court ought not to do a nugatory act by hearing the appeal, inasmuch as the appellant could not be compelled to submit to the decision in the event of its being adverse to him. "He might thus be enabled," say the court, "to defeat the ends of justice entirely, for he may be able to keep beyond the reach of the officers, until by death or removal of witnesses, or other causes his conviction upon a second trial would be rendered improbable, if not impossible. As he has chosen to undertake to relieve himself by flight in contempt of the authority of the court and of the laws, he cannot also invoke the aid of this court."

In *Commonwealth v. Andrews*, 97 Mass. 543, it was adjudged

* See note, 44 Am. Rep. 88.

that an escaped convict had no right to have his exceptions heard in the appellate court; that by voluntarily withdrawing himself from the jurisdiction of the court by flight, he had waived his constitutional right to be heard, either by himself or counsel, a hearing of the cause under such circumstances availing nothing.

There are like rulings of numerous other courts of high authority, holding to the doctrine that an escaped prisoner who has been convicted of crime, shall not be permitted to prosecute an appeal to reverse the judgment of conviction, or be heard for any purpose until he re-submits himself to the custody of the law and the jurisdiction of the court. *Wilson v. Com.*, 10 Bush, 526; s. c., 19 Am. Rep. 76; *Sherman v. Com.*, 14 Gratt. 677; *Leftwich v. Com.*, 20 id. 716; *Anon.*, 31 Me. 592; *State v. Rippon*, 2 Bay, 99; *State v. Williams*, 32 La. Ann. 335; s. c., 36 Am. Rep. 272; *People v. Redinger*, 55 Cal. 290; s. c., 36 Am. Rep. 32; *State v. Sites*, 20 W. Va. 13.

The rule recognized in all the foregoing cases is to grant the motion to dismiss on affidavits, showing the fact of the prisoner's escape, without previous notice to the appellant or counsel. This is manifestly a rule of necessity, and one as to which no objection can lie in the mouth of the fugitive whose conduct has rendered it imperative upon the court.

The case of *Parsons v. State*, 22 Ala. 50, is opposed to these views and must on this point be overruled. The case is obviously an anomaly in criminal jurisprudence, and was not well considered, being entirely unsupported by authority. It is clearly a misconception of this ruling to suppose that it can properly be regarded, as a construction of our statutes, which do not undertake to regulate the subject under discussion. No harm can possibly result by a departure from it, as nothing is involved in it but a rule of criminal proceeding. It cannot be tolerated any more than supposed that convicts have deliberately broken jail upon the faith of any such infallible rule of procedure.

It is accordingly ordered that the motion to dismiss this cause be granted, unless it shall be made to appear on the regular call of the docket of the fourth division, at the next ensuing term of this court, that the appellant has submitted himself to the jurisdiction of this court by returning to the custody of the proper officer of the law.

So ordered.

In re Mohr.

IN RE MOHR.

(78 Ala. 503.)

Extradition — constructive flight.

A person arrested as a fugitive from justice on a warrant issued by the governor of Alabama, in pursuance of a requisition by the governor of Pennsylvania, based on an indictment found in that State, for false pretenses, may show, on *habeas corpus*, that he was not in the State of Pennsylvania at the time the offense is alleged to have been committed, and has never been there since ; that the goods in question were obtained by purchase from an agent of the prosecutor in the State of New York, to whom the false representations, if any, were made ; and that he has never fled from the State of Pennsylvania, and was therefore not a fugitive from justice.

APPPLICATION to set aside a discharge on *habeas corpus*. The opinion states the case.

Rice & Wiley, for petitioner.

W. L. Brugg, R. M. Williamson and J. N. Arrington, contra.

SOMERVILLE, J. The purpose of the present application is to vacate the action of the Probate judge, discharging one Alexander Mohr from alleged illegal custody, on his petition for the writ of *habeas corpus*. The return to the writ showed that the petitioner was held in the custody of the relator, Frederick Gentner, as agent of the State of Pennsylvania, under a warrant of arrest issued by authority of the Governor of Alabama, pursuant to a requisition from the Governor of the former State, demanding his extradition as a fugitive from justice. The crime charged is that of obtaining goods by false pretenses. The Probate judge permitted evidence to be introduced, showing that the prisoner was not in the State of Pennsylvania at the time of the commission of the alleged offense, and had never been there since ; that the goods were obtained by purchase from an agent of the prosecutor in the State of New York, to whom the false representations, if any, were made, and that the petitioner had never fled from the State of Pennsylvania, and was not a fugitive from justice. It is claimed that the State courts have no jurisdiction of the case, and if so, that the Probate judge had no jurisdiction to go behind the warrant of the executive, to investigate the question as to whether or not the prisoner was in

fact a fugitive from justice ; and that the proceedings before him were *coram non judice* and void.

The questions thus raised for our consideration involve a construction of the clause in the Federal Constitution relating to the extradition of fugitive criminals between the several States, and of the law of Congress enacted for the purpose of its enforcement.

The Constitution of the United States provides, that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Art. IV, § 2.

The act of Congress designed to carry this constitutional provision into effect was passed in the year 1793, and is found substantially embraced in section 5278 of the Revised Statutes of the United States. It provides that "whenever the executive authority of any State or Territory demands any person, as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor, or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled, to cause him to be arrested and secured," and to be delivered up to the "agent" of the demanding State or Territory. Rev. Stat. U. S., § 5278.

The general assembly has seen fit to enact statutes in this State which are designed to be in aid of this congressional legislation, and impose the duty of extradition upon the governor in all cases falling within the purview of the Federal Constitution. Code, 1876, §§ 3977-3990. It is needless that we should refer to these in detail.

[Omitting the question of jurisdiction.]

We encounter more difficulty in the solution of the other question presented. Is it permissible to show that the case is not one coming within the provisions of the Constitution and act of Congress, because the party charged is not a fugitive from justice, having committed the alleged offense, if at all, only constructively while outside of the territorial jurisdiction of the demanding State ? Or are the

In re Mohr.

papers in the case, in connection with the warrant of arrest issued by the governor of this State, to be regarded as importing absolute verity in this particular, so as to be incapable of contradiction?

The statute provides, that if the return to the writ of *habeas corpus* shows that the petitioner is "in custody for any public offense, committed in any other State or Territory, for which, by the Constitution and laws of the United States, he should be delivered up to the authority of such State or Territory," he should be remanded. Code of 1876, § 4957. This is perhaps merely declaratory of what the law would require in the absence of the statute. The power claimed by the prisoner is the right to show that his case is one outside of the class intended to be covered by the Constitution and laws of the United States.

The authorities are not in harmony as to what questions can be reviewed by *habeas corpus* in cases of extradition. It seems very certain that there is no power to go behind the indictment or affidavit, with the view of investigating the question of the prisoner's guilt or innocence. *In re Clark*, 9 Wend. 212. He cannot be put upon trial for the crime with which he is charged, nor can any inquiry be made into either the merits of his defense, or mere formal defects in the charge. These inquiries are reserved for the courts of the demanding State, having jurisdiction of the offense. *People v. Brady*, 56 N. Y. 182; *Robinson v. Flanders*, 29 Ind. 10. Congress has seen fit to adopt special legislation regulating this phase of the evidence in the case. The act of 1793 makes conclusive the production of a copy of the indictment found, or an affidavit made before a magistrate of the demanding State, "charging the person demanded with having committed treason, felony, or other crime," certified as authentic by the governor of such State. U. S. Rev. Stats., § 5278. These papers, if in due form, are made conclusive evidence of the guilt of the accused, when assailed on *habeas corpus*. It may be considered therefore as the settled doctrine of the courts, that a *prima facie* case is made, when the return to the writ of *habeas corpus* shows: (1) A demand or requisition for the prisoner made by the executive of another State, from which he is alleged to have fled; (2) a copy of the indictment found, or affidavit made before a magistrate, charging the alleged fugitive with the commission of the crime, certified as authentic by the executive of the State making the demand; (3) the warrant of the governor authorizing the arrest. Where these facts are made to appear by papers

regular on their face, there is a weight of authority holding that the prisoner is *prima facie* under legal restraint. Spear Extrad. 208-303; *Matter of Clark*, 9 Wend. 212; *State v. Schlemn*, 4 Harring. 577; *In re Hooper*, 52 Wis. 699; *People v. Brady*, 56 N. Y. 182; Bump Notes of Const. Dec. 295-297; *Johnston v. Riley*, 13 Ga. 97.

Many of the cases hold that the warrant of the governor, reciting these jurisdictional facts, is itself *prima facie* sufficient to show that all the necessary prerequisites have been complied with prior to its issue by him, although as to this proposition there is a conflict of opinion. *Davis' case*, 122 Mass. 324; *Kingsbury's case*, 106 id. 223; *Robinson v. Flanders*, 29 Ind. 10; *Hartman v. Aveline*, 63 id. 344. Which of these is the correct view, we need not decide, as all the proper papers in due form are set out in the return made to the writ by the respondent, Gentner, who is the relator in this proceeding.

It is obvious that the extradition clause of the Federal Constitution has reference only to a specified class, and not to all criminals. Its language is, a person charged with any crime "who shall flee from justice and be found in another State." Art. IV, § 2. The act of Congress is more emphatic, if possible, in describing such person as an actual fugitive, characterizing him as one who "has fled," and the State in which he is found as the State to which he "has fled." U. S. Rev. Stats., § 5278. It may be considered clear therefore without any conflict of authority, that the Constitution and laws of Congress do not provide for the extradition of any persons except those who may have fled from or left the demanding State as fugitives from the justice of that State. Whart. Cr. Pl. (8th ed.) 31, and cases cited; Spear Extrad. 273, 310-316. "The offense," says Mr. Cooley, "must have been actually committed within the State making the demand, and the accused must have fled therefrom." Cooley Const. Lim. (5th ed.) *16, note 1.

There is a difference of opinion as to what must be the exact nature of this flight on the part of the criminal, but the better view perhaps is that any person is a fugitive within the purview of the Constitution, "who goes into a State, commits a crime, and then returns home." *Kingsbury's case*, 106 Mass. 223; Hurd. Hab. Corp. *606. In the case of *Voorhees*, 3 N. J. L., 141, he was characterized as one "who commits a crime in a State, and withdraws himself from such jurisdiction." This point however we need not

In re Mohr.

decide, as it is shown that the prisoner, Mohr, has never been into the jurisdiction of the demanding State since the commission of the alleged crime. He cannot therefore be said to be a fugitive from the justice of that State.

It is clear to our mind that crimes, which are not actually, but are only constructively committed within the jurisdiction of the demanding State, do not fall within the class of cases intended to be embraced by the Constitution or act of Congress. Such at least is the rule unless the criminal afterward goes into such State and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is, not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have "fled" from a State, in the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime. And only this class of persons are embraced within either the letter or spirit of the Constitution, the purpose of which was to make the extradition of fugitive criminals a matter of duty instead of mere comity between the States. The language of the Constitution and the law of Congress are entirely free from ambiguity on this point, being too obvious to admit of judicial construction; and the authorities are uniform in adoption of this view as to its manifest meaning. Whart. Cr. Pl. (8th ed.), § 31; Spear Extrad., 309-316; *Voorhees'* case, 3 N. J. L. 147; *Kingsbury's* case, 106 Mass. 223; *Ex parte Smith*, 3 McLean, 121; *Wilcox v. Nolze*, 34 Ohio St. 520.

We are of opinion that it was never intended by Congress in their enactment of the law of 1793, that the finding of the governor of a State that one is a fugitive from justice should be conclusive evidence of the fact, incapable of contradiction by facts showing the contrary. It is an important feature of the law, throwing some light upon its proper construction, that while it expressly prescribes the mode by which evidence of the crime charged shall be authenticated, it nowhere prescribes how the fact that he is a fugitive from justice shall be established. There seems to us to have been a good and sufficient reason for this distinction. Nothing was more proper than the policy of precluding the fugitive from disputing the certified records from the courts of a sister State, in view of the constitutional requirement that "full faith and credit" shall be given in each State to "the records and judicial proceedings of every other State" Const. U. S., art. IV, § 1. But no such reason applies to the impli-

cation of the defendant's being a fugitive because he is found in another State than the one in whose courts the charge is pending. It may be asserted that it was within the power of the governor to investigate this fact before he issued the warrant so as to satisfy himself of its truth. Perhaps this is the correct view, but this duty must in its very nature be discretionary. In practice the fact of the criminal's flight is usually shown by affidavit, but this cannot be regarded as conclusive upon any principle known to us, in the absence of statutory regulation so declaring the law. The better view seems to us to be, that one of the purposes of pretermittting express congressional legislation on this point was to refer the matter to executive determination, subject to review by *habeas corpus* in the courts in all proper cases. The papers being regular, the governor has a right to suppose that a *prima facie* case exists for a warrant, and the safer practice would seem to be that the accused should be remitted to the courts to establish matters of defense *aliunde* the record. Especially is this true in doubtful cases.

As we have said, the grounds of imprisonment in this class of cases are constantly reviewed by *habeas corpus* in the State courts. Whart. Cr. Pl., § 35. It is just as material to show that the prisoner does not come within the law, on the ground that he has never fled from the demanding State, as on the ground that he is not the identical person intended to be indicted, or that there is no authenticated copy of the indictment or other charge against him. All of these facts must concur before the law authorizes the requisition to be made or the warrant of arrest to issue. They are jurisdictional facts, in the absence of which the prisoner is excluded from the operation and influence of the law, and no extradition can be constitutionally authorized by congressional legislation. Whart. Cr. Pl. (8th ed.), §§ 31, 34-35.

This view is supported by the best considered cases, and parol evidence has been often admitted by the courts in proceedings by *habeas corpus*, for the purpose of showing that the warrant of the governor was improvidently issued under the mistaken belief that the prisoner was a fugitive.

The case of *Wilcox v. Nolze*, 34 Ohio St. 520, decided in the year 1878, was a case of this kind : The prisoner had been indicted in the courts of New York for obtaining goods by false pretenses. The governor of that State sent a requisition to the governor of Ohio, demanding the prisoner's extradition as a fugitive from

In re Mohr.

justice, under the act of Congress providing for such cases, the papers all being regular in form. The prisoner was allowed upon *habeas corpus* to review the governor's finding, that he was a fugitive from justice. Parol evidence was admitted to show that the crime had been only constructively committed and that he had never been in the demanding State, and could not therefore have fled from it. The court said: "Whether or not the accused committed the acts complained of while actually present in the demanding State, is jurisdictional; and it is clearly competent in such case to show by parol evidence a defect in the executive power, however regular the extradition papers may be in matters of form."

In *Hartman v. Aveline*, 63 Ind. 344, s. c., 30 Am. Rep. 217, the accused had been arrested under a warrant issued by the governor of Indiana, on a requisition from the governor of the State of Illinois, charging him with the crime of obtaining goods by false pretenses in the latter State, to the custody of whose agent he had been delivered on demand. Upon the writ of *habeas corpus* being sued out, it was shown that the accused was not in the State of Illinois at the time of the commission of the offense, but in the State of Indiana, where he resided, and that he had not fled from the former State. It was objected that the State courts had no jurisdiction to go behind the warrant of arrest issued by the governor, but the court held that there was nothing in the Constitution of the United States, or the laws of Congress, which precluded the inquiry. It was said that the mere recitals in an executive requisition, in the absence of an affidavit, showing an actual fleeing from justice, did not authorize the issue of the warrant.

The same view was taken by the Supreme Court of Iowa in *Jones v. Leonard*, 50 Iowa, 106; s. c., 32 Am. Rep. 116, a comparatively recent adjudication. A statute of that State provided that requisitions for fugitive criminals should be "accompanied by sworn evidence that the party charged is a fugitive from justice." The evidence accompanying the requisition consisted of an affidavit, charging that the plaintiffs were "fugitives from justice," which the governor determined to be sufficient. It was held that the prisoners, after arrest, could review the conclusion reached by the governor, and show that they were not fugitives from the State of Massachusetts, because the crime charged, which was obtaining goods by false pretenses, had been constructively committed by statements made in a letter, written from the State of Iowa, the

State of their domicile. The court decided that the extradition law of Congress did not apply to cases of constructive crime like that under consideration, and that it was competent for the State courts to review the conclusion of the governor. It was said by the court: "If the decision of the governor is final and conclusive as to this question, it must be so as to all questions touching the extradition of a citizen under the constitutional provision above quoted." And again: "The governor of this State is not clothed with judicial powers, and there is no provision of the Constitution or laws of the United States, or of this State, which provides that his determination is final and conclusive in the case of the extradition of the citizen." It was accordingly held by the court that the decision of the governor was only *prima facie* correct, and that it was reviewable by the courts, on petition sued out by the prisoner for the writ of *habeas corpus*.

The case of *Hibler v. State*, 43 Tex. 197, is in harmony with the same view. While it was there held that the governor of Texas *prima facie* had authority to issue his warrant of arrest, where the papers were regular, upon the mere representation in the requisition, that the accused was "a fugitive from justice," it was decided that this was a question of fact, which was disputable by proof to the contrary, showing that "the presumption upon which the governor had acted was unfounded in fact, and that thereby this process was being perverted to his injury."

There are other decisions strongly corroborative of the same view, but which we deem it unnecessary to review. *Ex parte Smith*, 3 McLean, 121; *Manchester's case*, 5 Cal. 237; Rorer Inter-State Law, 221-2.

We are cited by counsel to the case of *Ex parte Swearingen*, 13 S. C. 74, as an authority adverse to the foregoing views. The point decided in that case was merely, that the absence of an affidavit that the petitioner was a fugitive from justice was not fatal to the requisition; and from this conclusion the chief justice dissented in an opinion replete with the force of sound logic. The reasoning of the majority of the court in that case seemed to be based upon the false idea, that a denial of the fact that the accused was a fugitive was in the nature of an *alibi* defense, going to the merits of the indictment.

We are of opinion that the Probate judge did not err in discharging the petitioner, and that it was competent for him to hear

Ex Parte Powell.

oral evidence in order to establish the fact that the petitioner was not a fugitive from justice.

Any other conclusion than this would establish a doctrine very dangerous to the liberty of the citizen. It would greatly impair the efficacy of the proceeding of *habeas corpus*, which has been often characterized as the great writ of liberty, and may be regarded, not less than the right of trial by jury, as one of the chief corner-stones in the structure of our judiciary system. It might be justly considered as alarming to announce that a writ, which has so frequently been used for centuries past to prevent the encroachment of kings upon popular liberty, is inadequate for the just purposes for which it has been invoked in this case.

The application made by the relator must be denied.

Denied.

BRICKELL, C. J., dissenting.

EX PARTE POWELL.

(73 Ala. 517.)

Pardon — delivery and acceptance.

A pardon delivered to the warden of the penitentiary, directing him to restore the convict to liberty, is effectual and irrevocable, although at the time of delivery the convict was not in the penitentiary, but in jail, subject to the warden's orders, and awaiting removal.*

HABEAS corpus. The opinion states the facts, except that the governor withheld the pardon after its return to him by the warden.

Gaston A. Robbins, for relator.

H. C. Tompkins, attorney-general, for State.

SOMERVILLE, J. The present case involves the question as to the validity of a pardon alleged to have been granted to the relator by the governor of Alabama. The undisputed facts show that the petitioner was convicted of the crime of grand larceny, in the Circuit Court of Dallas county, in September, 1882; being sen-

* See *Knapp v. Thomas* (89 Ohio St. 377), 48 Am. Rep. 462.

tenced by the judgment of the court to four years' imprisonment in the State penitentiary. This judgment was affirmed on appeal to this court, on the 16th day of June, 1883.

Upon application being made to the governor, after this conviction, in due form of law by the petitioner, asking for a pardon, the instrument was prepared and signed by his excellency, in the usual form, on the 21st day of July, 1883, and was delivered to the secretary of State, as the record recites, "for the benefit" of the petitioner, and this officer attested the same by affixing his signature and the seal of the State, pursuant to the duty imposed upon him by the statute. Code, § 73. It declares with due solemnity and certainty, the fact that the petitioner has been pardoned of the crime in question, by virtue of the constitutional power vested in the governor, which authorizes him to grant pardons after conviction in all cases, except in cases of treason and impeachment. Const., 1875, art. V, § 12. It purports on its face to be directed to the warden of the penitentiary, and concludes by ordering that the relator "be at once restored to liberty." This instrument was transmitted by mail to the warden, and was received by him on the 22d day of July, 1883, the day following its signature by the chief executive. On the same day the governor communicated by letter to the counsel of the petitioner the fact that he felt it to be his duty to grant the pardon, and had accordingly ordered it. The warden upon receiving the pardon, returned it to the governor with the statement that he held no such person as Richard Powell (the relator) in his custody.

It is made to appear that the prisoner was at this time in the jail of Dallas county, subject to the order of the warden, under the provisions of the act of February 7, 1879, providing for the conveyance of convicts to the penitentiary. This statute makes it the duty of the clerk of the court to promptly inform the warden what convicts have been sentenced to the penitentiary at the last term of each court, and that they were then in the county jail, "subject to his order." The warden thereupon has authority and it is made his duty to remove such convicts from the jail, and to deliver them to the nearest contractor, not inconsistent with the obligation of his contracts made for hiring. It is shown by the record that the clerk of the court had made this written communication to the warden as required by the statute.

Ex Parte Powell.

It is one of the agreed facts of the case furthermore, that it was the warden's custom, when such pardons were received, to discharge the person pardoned from custody, and to "place the pardon on file in his office as authority for making such discharge." The foregoing are the essential facts of the case as agreed upon by the opposing counsel.

The point of contention is, that the pardon was never delivered to or accepted by the prisoner.

The pardoning power as exercised under our form of government, both Federal and State, is no doubt essentially the same in its nature and effect as that exercised by the representatives of the British crown, in the parent country whence we derive our system of common-law jurisprudence. A pardon, alike under both systems of government, has always been considered a mere act of grace or governmental forgiveness of an offense, by which the penalty of crime is legally remitted. 2 Abb. L. Dict., title Pardon. The proposition is undeniable, at least on authority, that a pardon in order to be complete must in contemplation of law be delivered and accepted. 1 Bish. Cr. Law, § 907. In *United States v. Wilson*, 7 Pet. 150, it was said by Chief Justice MARSHALL, that "a pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance." In this case the prisoner had not only declined to plead his pardon to the pending prosecution, but had in open court declared that he did not desire to avail himself of it in order to avoid the sentence.

We think the principles applicable to the delivery of a pardon and of an ordinary deed of gift must be considered as analogous. In the case of a deed, its delivery is generally said to be complete when the grantor has parted with his entire control, or dominion over the instrument, with the intention that it shall pass to the grantee or obligee, and the latter assents to it, either by himself or his agent. 2 Greenl. Ev., § 297. The delivery may as well be made also to a stranger, for the benefit of the grantee. The just distinction is, that a delivery to the grantee personally carries with it the presumption of the grantor's intention to part with his dominion over the instrument; but no such presumption will be indulged, where the deed is handed to a stranger. To make a delivery to a stranger effectual in ordinary cases, the intention with which the delivery was made must be expressed at the time in some appropriate manner, although no formal words or acts are necessary. Tiedman Real Prop., § 814, and cases cited. Or in other words, as

said by Mr. Wharton, it must be shown that a delivery was "manifestly intended." 2 Whart. Cont., § 677. It has been accordingly decided by this court, that where a mortgagor acknowledged the deed of mortgage, on the day of its date, before the Probate judge, and left it with him for registration, and it was recorded, this was *prima facie* a delivery, although the mortgagee never had possession of the deed, and knew nothing of its existence until after the death of the mortgagor. *Elsberry v. Boykin*, 65 Ala. 336. It was declared in the same case, that the conveyance being for the benefit of the grantee, without conditions attached, the acceptance of the grantee would be presumed, and could be repelled only by proof of his actual dissent. Such is the prevailing rule as to acceptance, where an instrument is purely beneficial to the party to whom it is made, and is freed from the embarrassment of any burden, duty, or condition. 2 Greenl. Ev., § 297.

We are of the opinion in the present case, that the pardon in question must be regarded as having been constructively delivered and accepted, in legal contemplation. The delivery to the warden was a sufficient delivery to the prisoner, and the acceptance of the prisoner must be presumed, in view of his previous application for the pardon, and of its purely beneficial character.

The governor clearly intended the act of grace to the prisoner, and all the legal formalities were adopted by him, necessary to the proper execution of the instrument. He had given it his signature, and had handed it to the secretary of State, who had attested it, and affixed the seal of the State in all due form. The mailing of it to the warden was in itself a parting with dominion over it, and the act of grace must be deemed complete when the latter received it, if not before. This is true in view of the legal status and relationship of the warden toward the prisoner. He was not the mere messenger of the executive to deliver, but the constructive agent of the prisoner to receive. The prisoner was not, it is true, confined in the walls of the penitentiary, but he was in the constructive custody of the warden, and subject to his control and order in the Dallas county jail, under the express provisions of the statute. Acts, 1878-9, pp. 170-1. It is shown to have been the common usage to transmit pardons to the warden, and that he usually retained them as vouchers of authority to release convicts, and the parties are presumed to have had this usage in view. The pardon itself being directed to the warden, and being

Ex Parte Powell.

an executive mandate to him, ordering the release of the prisoner, is persuasive to show that it was never intended that it should go further than the warden, or be delivered to the prisoner personally. When the charter of the prisoner's pardon reached the hands of the warden, his constituted legal custodian, the executive act of grace was complete, and forever irrevocable. The warden had no more legal right to return it to the grantor through inadvertence, than he would have had to destroy it from malice.

The adjudged cases clearly sustain this view. The case of *Commonwealth v. Halloway*, 44 Penn. St. 210, was one involving the delivery of a pardon granted by the governor of Pennsylvania to one Crosse, who had been convicted of a felony, and sentenced to imprisonment in the State penitentiary. The pardon was delivered to the United States marshal under the belief that Crosse was needed by the government at Washington for special service in the war department, and was not to be handed to him until he had performed the service required of him. The marshal however delivered it to the warden and obtained the release of the prisoner for the required service. It was said by the court, that "by usage, its delivery to the warden is *prima facie* equivalent to delivery; or is constructive delivery to the prisoner; but it is open to be proved no delivery by showing circumstances that are inconsistent with the intention to deliver." The pardon in that case was pronounced void however because procured by false and forged representations independent of the question of delivery. In *Ex parte Reno*, 66 Mo. 266; s. c., 27 Am. Rep. 337, it was said that "simple intention on the part of the executive to bestow a pardon confers no right, and is perfectly nugatory until the intention may be said to be completed. This intention," it was added, "may be said to be fully completed when the pardon is signed by the executive, properly attested, authenticated by the seal of the State, and delivered, either to the person who is the subject of the favor, or to some one acting for him, or on his behalf." It being shown that it was the custom to deliver pardons to the warden, it was held that the delivery was presumptively complete when the paper came to the hands of this officer, although it never reached the personal custody of the prisoner. In this case the instrument of pardon seems to have been purposely mislaid, or destroyed so as to prevent its personal delivery to the prisoner. Following the ruling in the Pennsylvania case, the court said: "A delivery of the pardon, under the circumstances

in proof, is *prima facie* equivalent to delivery, or is constructive delivery to the prisoner." In *DePuy's* case, 3 Ben. 307, a pardon was granted to the prisoner by Andrew Johnson, president of the United States, and was transmitted by mail to a United States' marshal, to be by him delivered to the warden of Blackwell's Island penitentiary, where the convict was confined in the warden's custody. Before it passed from the hands of the marshal into those of the warden, it was recalled by President Grant, as Johnson's successor in the office of president. It was held by Blatchford, J., on an application for writ of *habeas corpus*, that there was no complete delivery until the pardon reached the hands of the warden, or keeper of the prison — that a delivery to the marshal was insufficient, because he was no more than "the messenger of the president" — a somewhat doubtful proposition, which does not seem very obvious to our apprehension. In *Marbury v. Madison*, 1 Cr. 137, which was an application for *mandamus* to compel the delivery, by the secretary of State, of a commission as justice of the peace in the District of Columbia, it was held that the appointment was complete without a delivery of the commission. But it was added, that if delivery was deemed essential, as argued by counsel at the bar, it was not necessary that it should have been made personally to the grantee of the office. Said the great chief justice, who delivered the opinion of the court: "The law would seem to contemplate that it should be made to the secretary of State, since it directs the secretary to affix the seal to the commission after it shall have been signed by the president. If then the act of delivery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party." The conclusion must have been reached upon the ground; that the secretary of State was the agent of the law, and not of the president, for the duty imposed upon him. In like manner, it was decided by the Supreme Court of Louisiana, in *State v. Baptiste*, 26 La. Ann. 134, that a mere communication from the secretary of the senate to the governor, informing him that a recommendation for pardon had been received and acted upon favorably, is sufficient evidence of the completeness of the act of pardon, no actual delivery being deemed necessary in order to give it validity.

So we are clearly of opinion, that the delivery of the pardon to the warden of the State penitentiary, under the circumstances of

Ex Parte Powell.

the present case, was in accordance with usage a delivery to the prisoner, who was in the warden's constructive custody, and that the intended act of grace was then completed and irrevocable. Being an act of mere clemency, without conditions, the law presumes that it was accepted, in the absence of evidence showing the prisoner's dissent. *Ex parte Reno*, 66 Mo. 266; s. c., 27 Am. Rep. 337; *Com. v. Holloway*, 44 Penn. St. 210.

The writ of *habeat corpus* and *certiorari* will be awarded by this court to bring the petitioner before us, together with the proceedings had before the Circuit judge, unless on another application before him, or some other judge having jurisdiction, the prisoner shall be discharged from custody.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

COLE V. SUPERIOR COURT.

(68 Cal. 86.)

Guardian — ad litem — power to contract for attorney fees.

A guardian *ad litem* cannot bind those whom he represents by a contract with an attorney, fixing his compensation in the suit.

THE opinion states the case.

E. D. Wheeler, for petitioner.

M. C. Hassett, for respondents.

MYRICK, J. A writ of review was granted on the application of petitioner to review the action of the Superior Court had upon the following state of facts:

Catharine McKeever, an insane woman, and John McKeever, Jane McKeever, and Mary McKeever, minors, by their guardian *ad litem*, Margaret Hayes, commenced an action against the Market Street Railway Company, to recover damages for the death of Daniel McKeever, the husband of said Catharine, and the father of said minors. The said guardian *ad litem* employed the petitioner,

Cole v. Superior Court.

E. P. Cole, Esq., an attorney at law, to commence and prosecute said action as attorney for the plaintiffs. The guardian *ad litem* had no means with which to pay the necessary expenses of the action, including costs and the attorney's fees, and Mr. Cole undertook to, and did pay the costs. Such proceedings were had in the action that on the 9th day of December, 1880, judgment was recovered by the plaintiffs against the railway company for \$6,501.25 damages, with interest, and \$108.50 costs; which judgment, on appeal, was affirmed by this court. Upon the going down of the remittitur an execution was issued February 3, 1882, and on the following day, February 4, the railway company paid to Mr. Cole the sum of \$7,144.26, being the full amount then due for damages, interest, and costs; and Mr. Cole caused satisfaction to be entered. During the pendency of said appeal in this court, to-wit, on the 28th day of October, 1881, letters of guardianship of the persons and estates of the said minors were duly issued by the proper court, to-wit, the Superior Court of the city and county of San Francisco, to Daniel Sheerin. On the 4th day of February, 1882, the day on which the attorney received the amount of the judgment, the said Daniel Sheerin, as guardian, petitioned the Superior Court in which said judgment had been rendered for an order that Mr. Cole pay the money into court, and that the court fix his proper compensation. An order to show cause was made and served. On the hearing the attorney admitted the receipt of the money, and that he was ready and willing to pay to any person authorized to receive the same the amount which justly and fairly belonged to the plaintiffs, but objected that the court had no authority to fix the compensation, or to compel him to pay the money into court. The court overruled the objection, and after hearing testimony fixed the full compensation of counsel for the plaintiffs for services and expenses at \$2,500, and ordered that the balance of the amount received be paid into court by two o'clock of February 8, 1882. On the 9th day of February, 1882, Mr. Cole paid into court \$4,644.26, leaving in his hands \$2,500, the amount fixed by the court, and on the same day the court ordered that \$3,000 of the amount so paid be paid to Sheerin, the guardian of the minors, on his giving a proper bond.

The question for consideration before us is as to the power of the Superior Court in which the action was pending, and the judgment was obtained, to fix the compensation of the attorney employed by

Cole v. Superior Court.

the guardian *ad litem*, and order the balance paid into court. It is proper to remark that the only objection appearing on the part of the attorney is as to the power of the court to make the order. It is urged on his behalf that the court had no power "to take from Mr. Cole's pocket money lawfully in his possession, and that he claimed in good faith to be his own, and transfer it to the custody of the clerk of the court" [we quote from the argument]; that the Constitution of this State guarantees to all the right of trial by jury, and that "no person shall be deprived of life, liberty, or property, without due process of law"; that he had the right to submit to a jury, in a regular action instituted to that end, evidence as to what would be a proper compensation, and to have the determination of the jury thereupon.

By the law of this State, § 1021, Code of Civil Procedure, "the measure and mode of compensation of attorneys and counsellors at law is left to the agreement express or implied of the parties"; and in cases where an attorney is employed by a person capable of making a contract, which shall bind him or those whom he may represent, the attorney may have his action to recover the amount agreed upon in the one case, or the value of the services in the other; and in such cases, the fact of the existence of the contract and the amount agreed upon, or the value may be submitted to a jury. But in cases where there is no one authorized to make a binding contract, the section of the Code above referred to would not apply. There must be some one on either side authorized to contract, or there is of course no valid contract. In *Gurnee v. Maloney*, 38 Cal. 85, this court held that the administrator of the estate of a deceased person could not make a contract for the payment of fees for services to be rendered by an attorney which would bind the estate. It seems to have been conceded in that case that the administrator had power to select an attorney, but such selection would be made, and the services would be rendered in view of the rule that the proper court [in that case the Probate Court], would have the right to pass upon and determine the proper compensation. In the matter before us neither of the plaintiffs in the action under consideration could have employed an attorney to commence or prosecute the action — neither could have brought the action in his or her own name — each of them was under disability; it was therefore necessary that the action should be brought by a general guardian, or by a guardian *ad litem*. In the case of a general guardian the

Cole v. Superior Court.

appointment would have been made after due proceedings under article 2, chapter 14, Code Civ. Proc.; in the case of a guardian *ad litem* the appointment would be made by the court in which the action was pending or was about to be commenced. It is not necessary to consider in this case the powers of a general guardian regarding the employment of an attorney; we are now considering only the powers of a guardian *ad litem*. The guardian *ad litem* is an officer of the court appointing him; his duties are to "represent the infant, insane or incompetent person in the action or proceeding." Code Civ. Proc., § 372. He may doubtless employ an attorney to assist him in the prosecution or defense of the action, but he may not make a contract for the payment of compensation which shall absolutely bind the ward or his estate. He is like an agent with limited powers. If he collect the amount of a money judgment recovered by the plaintiff in the action, it should seem that from the nature of his office, he may be compelled to an accounting by the court from which he received his authority. The court is in effect the guardian — the person named as guardian *ad litem* being but the agent to whom the court, in appointing him (thus exercising the power of the sovereign State as *parens patriæ*) has delegated the execution of the trust; and through such agent the court performs its duty of protecting the rights of the infant or incompetent person. His powers are certainly no greater than those of a general guardian. Like the latter he may be allowed a credit for moneys advanced or paid out of the fund collected, as reasonable compensation for the expenses, and for the services of an attorney. But he has no power by specific agreement with the attorney to fix such compensation absolutely. An attorney accepting employment, and rendering services under such circumstances, must rely upon the subsequent action of the court in ascertaining and adjudging proper compensation. He cannot determine the amount, nor can he retain what he or the guardian *ad litem* may deem a proper sum, leaving it to the general guardian to sue for the excess. There is no place here for the doctrine of an implied promise upon a *quantum meruit*. The presumption of a promise is rebutted by the fact that the guardian had no power to contract in such manner as to bind the assets of the ward except conditionally. The attorney performing legal services for the infant aids the court in carrying out its duty of protection; he is not only an officer of the court in the general sense, but is the special agent through which the court acts; in this

respect his position being analogous to that of an attorney employed by a general guardian, or by an executor or administrator. In the cases last referred to the compensation is under our system of laws fixed by the Probate Court. The statute being silent as to the tribunal which is to fix the compensation in case of a guardian *ad litem*, it seems to reasonably follow that the court placing him in position and making use of his service would have the fixing of his disbursements and the compensation of the attorney employed.

The cases cited by the petitioner do not apply to this case. *In re Paschal*, 10 Wall. 483, was a case of employment with power to contract. In that case, the party applying for the order that his attorney pay to him the amount collected, was capable of contracting and had contracted, for the employment and for the compensation; and the attorney claimed the right to have his accounts with the client fully adjusted. The court held that it would not in such a proceeding adjust the accounts, but would leave the party to his action. The court did not stand in any such relation with the party and the attorney as courts stand with regard to infants and attorneys acting in their behalf.

It is urged, that by not permitting the attorney for the infant to retain such portion of the money collected as he may deem just, he is deprived of his property without due process of law, and is also deprived of his constitutional right of trial by jury. The error of the petitioner is in supposing that any specific portion of the money is his property. Such portion only of the money collected will be his property as the court may fix; and until so fixed, he has no such right of property, as is contemplated by the Constitution. In accepting the employment he consented to perform his duty without other compensation than such as might be allowed by the court. The guarantee of the right of trial by jury does not apply to such a case as this. There is no question of fact for a jury to try. The court fixes the amount, and when so fixed it is settled.

It is also urged that there was no power to direct the money to be paid on the application of the general guardian; that so long as the appointment of the guardian *ad litem* remained unrevoked, the general guardian had no standing in regard to the suit. It is sufficient to say that the appointment of the guardian *ad litem* is made, as the name of the office indicates, for the purpose of the suit — to represent the ward in the action. When the action is ter-

Reis v. Lawrence.

minated, the amount recovered becomes assets of the ward, to be managed and controlled for his benefit. The guardian *ad litem* does not manage the ward's general estate, investing and reinvesting, but such duties are performed by the general guardian; and in order to perform those duties he should have the control of the property.

The amount allowed to Mr. Cole for his services and disbursements was \$2,500. The costs recovered amounted to \$108.50. It would thus appear that the court allowed as compensation for services nearly \$2,400; and these amounts he was permitted to retain. The court certainly had power to direct him to pay over the remainder. Possibly the court might have had power, before fixing this amount for his services, to require him to pay over the whole sum collected, and afterward make such allowances as should be just, but the court saw fit to make the allowance first, and order the balance to be paid over. We see no error.

Writ dismissed.

MORRISON, C. J., THORNTON and ROSS, JJ., concurred; SHARPSTEIN and MCKEE, JJ., dissenting.

REIS V. LAWRENCE.

(88 Cal. 129.)

Marriage — acknowledgment — void divorce.

A woman living under her maiden name, apart from her husband, under a void decree of divorce, and acting and representing herself as a single woman, binds herself by her acknowledgment of a deed as a single woman. (See note, p. 87.)

ACTION on a note and to enforce a lien on land. The opinion states the facts. The defendant had judgment below.

Edward J. Pringle, for appellant.

William Irvine, for respondent.

ROSS, J. The defendant Edwin A. Lawrence is the father of the defendant Fannie P. Lawrence. The latter married one

Hiram Hutchinson, in the city of San Francisco, on the 13th of April, 1871. In the year of 1873 she went to the Territory of Utah for the purpose of obtaining a divorce from her husband, and on the 6th of May of that year filed in the Probate Court of Salt Lake county, Utah Territory, a petition in which she set forth that Hutchinson deserted and abandoned her on or about the first day of March, 1872, and had ever since continued his desertion and abandonment of her, and praying for a decree of divorce dissolving the bonds of matrimony existing between them. On the 15th of July, 1873, the court in which the proceeding was had entered a decree purporting to dissolve the bonds of matrimony existing between Mr. and Mrs. Hutchinson, and restoring to the petitioner her maiden name.

From the view we take of the case before us it will not be necessary to determine whether or not the decree of the Probate Court of Utah was validated by subsequent congressional action. Upon the entry of the decree on the 15th of July, 1873, Mrs. Hutchinson resumed her maiden name, and never afterward lived with Hutchinson, but has ever since that date lived and acted as a single woman, and borne her maiden name.

On the 26th of May, 1874, she was the owner of a certain piece of land situated in Alameda county of this State, which was her separate property, it having been given to her by her father on the occasion of her marriage. On the day last named she signed a power of attorney, very general in its terms, appointing her father her attorney in fact to (among other things) "lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate" her said land, upon such terms and conditions and under such covenants as to him should seem fit. The power as well as the certificate of acknowledgment described the constituent as "Fannie P. Lawrence, formerly Fannie L. Hutchinson," and the power was so signed. The certificate, however did not conform to the requirements of our statute prescribing the form for certificates of acknowledgment of married women.

When the power of attorney, so signed and acknowledged, was received by Edwin A. Lawrence, the latter was the owner of various certificates of purchase issued by the State of California for State lands, on which Gustave Reis held a mortgage executed to him by Lawrence. A part of the purchase-money of the lands had been paid, but a part of it remained unpaid. In due course of time an

Reis v. Lawrence.

installment became due. Lawrence needed the money with which to make the payment. He negotiated with Mr. E. B. Mastick for the loan of the required amount on a mortgage he proposed to give on his daughter's land under and by virtue of the power of attorney. The power, the daughter testified on the trial of this case, she signed unwillingly and only after urgent solicitation on the part of her father; and in answer to the question "Why did your father urge you to execute the power of attorney to which you have referred?" she answered: "Because he said he had payments to make on certain lands of his, and that in case of necessity he wished to raise enough money on my property to meet that demand; but that he hardly thought he would be obliged to do so; but he wished to have the paper on hand, so in case of need he could make use of it." In endeavoring to obtain money on the strength of his daughter's land, Edwin A. Lawrence was therefore but carrying out the purpose had in view by both when the daughter gave him the power.

His negotiations with Mr. Mastick for a loan of the required money failed of accomplishment on the last day allowed for the payment of the installment due upon the certificates of purchase. In this extremity he applied to Gustave Reis for the loan of the amount necessary to make the payment, viz., \$4,550. Gustave furnished a part of the money, but got the greater part of it from Ferdinand Reis, who is the plaintiff in this action. The loan was accordingly made, and as security for its payment Edwin A. Lawrence executed to the plaintiff Reis a deed for the Alameda land as attorney in fact for Fannie P. Lawrence. At the time of this transaction, which took place on the 27th of June, 1874, Edwin A. Lawrence represented to Reis that his daughter had obtained a divorce from her husband in Salt Lake, and had been restored to her maiden name. Subsequently, to-wit, on the 18th of September, 1874, upon application made on behalf of the plaintiff, Fannie P. Lawrence executed to plaintiff a deed for the same land described in the deed already executed to him by her father as her attorney in fact, which deed expressed a consideration of \$4,500, and contained the clause: "This deed is given in confirmation of the deed given by me to said Reis on June 27, 1874, by my attorney in fact, hereby ratifying and confirming the same." The certificate of acknowledgment to this confirmatory deed described the grantor as "Fannie P. Lawrence (*feme sole*)," and complied with the re-

quirements of the statute prescribing the form of such certificates for others than married women, but did not conform to those in respect to the latter.

The case further shows that in the month of July, 1877, Hutchinson commenced an action in the District Court of Marin county of this State against the defendant Fannie for the purpose of obtaining a decree dissolving the bonds of matrimony alleged to have existed between them since the 13th of April, 1871, on the ground that the defendant therein, on or about the 1st of July, 1872, deserted the plaintiff in that action, and from that time forth lived apart from him, and denied him all marital rights. After trial the court in which the action was brought decreed the plaintiff a divorce on the ground stated in his complaint.

We assume that the Utah decree was invalid. Nevertheless the fact remains that upon the rendition of that decree the defendant, Fannie P. Lawrence, resumed her maiden name, and thence hitherto continued to act and represent herself as a *feme sole*. As such she signed and acknowledged the power of attorney to her father for the purpose of enabling him to borrow money on the strength of her land. On the security of that land, and on those representations, the father did borrow money, and to secure its repayment executed to the lender, pursuant to the power, a deed for the premises. Subsequently, and in consideration of that loan, the daughter, still acting and representing herself as a *feme sole*, executed as such to the lender another deed for the premises, in which she recited that it was given in confirmation of the deed previously executed by her attorney in fact. At this day she seeks to avoid the effect of these conveyances to the injury of the party who parted with his money on the strength of her actions and representations by saying that she was all along a married woman, and that the certificates of acknowledgment to the instruments executed by her were not in accordance with the form prescribed by statute for married women in that they did not recite that she was examined "without the hearing of her husband," a husband who, according to her petition for divorce filed in Utah, had deserted and abandoned her on the 1st day of March, 1872, and whom, according to the record put in evidence from the District Court of Marin county, she had deserted and abandoned in July of the same year, and between whom no marital relations other than the dry, legal relation in fact existed. Of course, under such circumstances the reason for the rule that

Reis v. Lawrence.

requires, in cases of married women, the certificate of acknowledgment to recite an examination without the hearing of the husband, does not exist. At least as early as July, 1872, the defendant Annie lived apart from, and independent of her husband. Later on, in 1873, she resumed her maiden name, and thence hitherto acted and represented herself as a single woman. In that character she executed the instruments in question, and in that character, in our opinion, a court of equity ought to regard her in the construction of them. As giving support to these views, see *Richeson v. Simmons*, 47 Mo. 20; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Patterson v. Lawrence*, 90 Ill. 174; s. c., 32 Am. Rep. 221.

We find it unnecessary to determine whether the rules based on the common-law relation of husband and wife are to be applied to their full extent in this State, where the wife is now by statute empowered to dispose of her separate estate without the consent or concurrence of her husband.

It follows that the plaintiff is entitled to the lien prayed for.

Judgment and order reversed, and cause remanded for a new trial.

MORRISON, C. J., SHARPSTEIN and MYRICK, JJ., concurred; MCKEE and THORNTON, JJ., dissent.

NOTE BY THE REPORTER.— See *Hayward v. Barker*, 52 Vt. 429; s. c., 36 Am. Rep. 762, and note, 764.

In *Rosenthal v. Mayhugh*, 33 Ohio St. 155, the husband had deserted and abandoned his wife for more than seven years. She supposed him dead, and joined her children in a conveyance in fee with warranty, and it was held, that although the husband be living, and although such conveyance does not operate as a release of her inchoate right of dower, yet she is barred by way of equitable estoppel from treating her contract as a nullity, and from asserting her right to have dower assigned, upon the actual death of her husband. The court said: "It is also well settled in Ohio, and the principle is well supported by decisions in other States, that while a married woman's covenants in a deed in which she joins with her husband are invalid, and cannot be made the foundation of an action against her for a breach, yet, as in the case of an expectant heir, they operate by way of estoppel on her after-acquired title. *Hill v. West*, 8 Ohio, 222; 31 Am. Dec. 442; *Fowler v. Shearer*, 7 Mass. 21; *Colcord v. Swan*, id. 291; *Massie v. Sebastian*, 4 Bibb, 486; *Nash v. Spofford*, 10 Metc. 294; 43 Am. Dec. 425; *Nelson v. Harwood*, 3 Call. 342; *Wadleigh v. Glines*, 6 N. H. 18.

"If such is the effect of covenants in a deed properly executed by a married woman, acting under all the disabilities of coverture, *a fortiori*, it would seem she could be estopped by such covenants where no such disabilities, in fact, existed. And if the covenants of an heir apparent estop him, though his

Reis v. Lawrence.

deed is void as a conveyance, because he has no vested interest, why should it not estop her, who has an inchoate right of dower?"

"The disabilities arising from coverture rest on the common-law theory of the marriage relation. By marriage, the legal existence of the woman is suspended, or at least, incorporated into that of the husband, under whose protection or cover she acts.

"It is said these disabilities 'are for the most part intended for her protection and benefit.' 1 Bl. Com. 445.

"As a logical deduction it follows, that when this dominion of the husband, and this protecting care permanently ceases by the death of the husband, whether natural or civil, or by his being exiled or banished, or where he had deserted and abandoned his wife, leaving her to maintain herself, the disability of coverture ceases, *cessante ratione, cessat ipsa*.

"There is a wide difference between the powers of a married woman under such circumstances and those where the marriage relation exists in fact, as to the wife's capacity to contract, sue and be sued.

"In *Gregory v. Paul*, 15 Mass. 31, it is said, 'when the husband had deserted his wife in a foreign country, and she had thereafter maintained herself as a single woman, and for five years had lived in that Commonwealth, the husband being a foreigner, and never having been in the United States, she was competent to sue and be sued as a *feme sole*.'

"It is there said that the common-law rule was relaxed from necessity, where the reason on which it was founded ceased to exist, as where the husband was exiled, or had abjured the realm, she might sue for her dower as a widow. 'In such case also she has been permitted to alien her land, without her husband; and in such cases she is exempted from the disabilities of coverture. She may maintain trespass, she may sue for her jointure, and she may be sued as a *feme sole*. She may also make her will, and she might in all things act as if her husband was dead, and that the necessity of the case required that she should have such a power.'

"The reason for this is forcibly stated by PUTNAM, J.: 'Miserable indeed would be the situations of these unfortunate women, whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach him; and they could not recover for a trespass upon their person or their property, or for the labor of their hands. They would be left wretched dependents upon charity, or driven to the commission of crimes to obtain a precarious support.'

"Numerous cases might be cited in support of this doctrine, which we need not notice. They have been examined at length in *Benadum v. Pratt*, 1 Ohio St. 403. In that case the wife had by the gross abuse of her husband been compelled to live separate from him, so that a separation *de facto* existed, she maintaining herself, and having specific property decreed to her as alimony. It was held that she might sue at law as a *feme sole* in regard to such property.

"After an examination of the authorities it is there said that 'It is estab-

Reis v. Lawrence.

lished by well adjudicated cases in the courts of the different States of this Union, that not only where the marriage relation is suspended by act of law, but where the husband is a foreigner, residing permanently abroad, or where, by his cruelty, a separation is forced, and the wife removes to another State, and maintains herself as a single woman — in either of these cases, whether the wife have or have not a separate allowance, she is entitled to sue and be sued as a *feme sole*. And this right extends to whatever contract she may make, and to whatever property or interest she may have.'

"In *Bean v. Morgan*, 4 McCord, 148, it was held that if the husband departs the State, with intent to reside abroad, and without the intention of returning, his wife becomes competent to contract and to sue and be sued as a *feme sole*.

"In *Gregory v. Pierce*, 4 Metc. 478, the court say: 'The principle is now to be considered as established in this State, as a necessary exception to the rule of the common law, placing married women under disability to contract or maintain a suit, that where the husband was never within the Commonwealth, or has gone beyond its jurisdiction — has wholly renounced his marital rights and duties, and deserted his wife — she may make and take contracts, sue and be sued, in her own name, as a *feme sole*. It must be a voluntary separation, embracing both fact and intent of the husband to renounce, *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*.'

"It is true that the English rule, prior to recent statutes, limits this exception to cases of divorce *a vinculo*, or of civil death, as where the husband has abjured the realm, been exiled or transported for crime, or where he was a foreigner at the time of marriage, and continued to reside abroad; but the whole current of American authority, as well as recent legislation in this country and England, is to the effect that where the husband abandons his wife permanently and neglects or refuses to support her, but compels her to maintain herself, under such circumstances and length of time as to show a renunciation of his marital rights, and a separation *de facto*, she may act as a *feme sole*, in making contracts relating to her property interests, as well as to sue and be sued.

"This exception to the rigid rule of the common law is dictated in the interest of the abandoned wife, by public policy, common humanity, and natural justice, in order that the wife may provide herself with that support and protection which is denied her by a faithless husband.

"Schouler's Domestic Relations, 295, says: 'The current of American authority, legislative and judicial alike, decidedly favors so just a doctrine. And in England, recent statutes secure to married women privileges to a similar extent, under like circumstances.' See, also, *Anderson v. Jacobson*, 66 Ill. 522.

"In making this deed, Mrs. Mayhugh acted, as well as she might, as a *feme sole*, and in order to make the sale, represented herself as such. So far as appears, she received an adequate consideration for the sale. The contract was fully executed on both sides, as she then supposed.

She does not offer to rescind, by tendering back the consideration; but

retains the fruit of her contract, while treating it as a nullity. In the meantime, her grantee, acting, as we may presume, on the faith of representation and covenants, had improved the property, and conveyed it to a *bona fide* purchaser, for value — the present plaintiff in error.

“If this were an executory contract to convey, and the purchaser sought to enforce a conveyance upon payment of the consideration, equity might refuse to do so ; but where she has received the consideration, and executed the contract, as far as she had capacity to do so, a court of equity will not aid her to repudiate it. This principle was recognized in *Meiley v. Butler*, 26 Ohio St. 585. There the wife, who was living with her husband, induced a buyer to purchase lands owned in her own right, by verbally agreeing that a debt, due from her husband to the purchaser, should be taken in part payment. It was held that after such purchase, and a conveyance by her, she could not repudiate this contract as to her husband's debt, and collect the entire purchase-money. As against the purchaser from her, she was estopped by her verbal agreement, although under the disabilities of coverture.

“In *Bullock v. Griffin*, 1 Strobb. Eq. 60, it appeared that during coverture, and after the sale of the husband's lands, the wife, by agreement with the purchaser, took two shares as an equivalent for her contingent right of dower, and retained possession of them, without setting up any further claim for seven or eight years after discoveriture. The court refused to give her dower, on the ground that she was estopped.

“So, where a wife joined with her second husband in the conveyance of land, she is estopped to claim dower under her former husband in the land so conveyed. *Usher v. Richardson*, 29 Me. 415.

“And where her deed was void by reason of defective execution, but as executrix of her husband she brought suit to recover the purchase-money for the land conveyed by such deed during coverture, it was held that she thereby affirmed the deed, and would be barred from claiming dower. *Shore v. Anderson*, 7 S. & R. 42 ; 10 Am. Dec. 421.”

“Upon the whole therefore we conclude that under the facts of this case, the disabilities of coverture were in fact removed, so far as to make her capable of contracting, and suing, and being sued. At least, a court of equity would regard her as a *feme sole* ; and as such, bound by way of estoppel, on her executed contracts manifestly made for her benefit. It is for the interest and protection of a wife, thus abandoned, that she should be capable of acting as a *feme sole* ; and while the rigid and harsh rules of the common law, as it once existed in this State, regarded the wife, who was living and cohabiting with her husband, as under or protected by these disabilities, yet where such relation has, in fact, ceased for eight years, she is empowered and justified in acting as a *feme sole*.

“Having so acted, in making this conveyance, and in receiving the consideration, it would be grossly inequitable to allow her to repudiate her contract after having enjoyed its fruits.”

In *Richeson v. Simmons*, 47 Mo. 20, by an act of the Missouri legislature, a husband and wife were declared divorced, and for a period of twenty years afterward lived apart and ceased to intermeddle with the affairs of each other.

Reis v. Lawrence.

Both married again and brought up children born of such marriages, built up separate and distinct property, and transacted their business without regard to any previous connection between them. *Held*, that even admitting the divorce to be illegal, the law did not require the wife, after her second marriage, when she wished to dispose of her separate property, to prevail on her former husband to join in the conveyance, while he professed at the same time to be the husband of another woman. The length of time which elapsed after the divorce, and the manner in which each party regarded and treated the other, operated as an estoppel, and precluded them from interfering with the affairs of one another.

The court said : “ By the common law the wife was incapable of acting or entering into contracts without the consent of the husband. Whilst covert she labored under a complete and total disability ; but certain exceptions were made on grounds of necessity and humanity. Thus, where the husband abjured the realm, or was banished, or had left the jurisdiction of the country for an indefinite time, the wife was allowed to act as a *feme sole*—to make contracts, sue and be sued, and also devise or bequeath her property by last will and testament. But I am persuaded that there is little analogy between those cases and this, and no aid can be derived from them. After the divorce the parties continued in the same jurisdiction ; they have resided in the city of St. Louis ever since, and now reside in it. There is nothing therefore which brings this case within the reasons of the authorities.

“ From all the investigation that I have given to the case, it is of first impression, so far as the question presented is concerned. Now the record shows that since 1849, a period of twenty years, Mr. Hill and Mrs. Barclay have not only lived separate and apart, but they have ceased to intermeddle with the affairs of each other. With mutual concurrence they have both changed their situation in life ; each has married and brought up children, built up separate and distinct property, and transacted their business without regard to any previous connection between them.

“ It may be reasonably inferred that there is not any very amicable feeling of relationship existing between them. Under such circumstances does the law demand or require the absurdity of Mrs. Barclay, when she wishes to dispose of her private property, going to Mr. Hill and asking him to join in the conveyance, when at the same time he professes to be the husband of another woman ? The length of time that has elapsed, the manner in which each party has regarded and treated the other, ought to operate as an effectual estoppel, and preclude either party from an attempt to intermeddle in the affairs of the other.

“ For upward of twenty years Mr. Hill, so far as his relationship toward Mrs. Barclay extends, has treated her as a *feme sole* ; and upon no principle of justice has he any interest in, or can he interfere or exert any control over, her property. Mr. Hill is not here claiming any right, but it is set up in defense that the deed is not valid unless he joins and concurs.

“ But I am not of this opinion. I think that as Mr. Hill has voluntarily renounced his marital rights, and by a course of policy persisted in for more than twenty years, has led Mrs. Barclay and the whole world to believe that

Bank of Sonoma County v. Gove.

all control or interest on his part had ceased and been surrendered, he can no longer be a party, nor need he be consulted in any disposition she may see proper to make of her property. Any other conclusion would be promotive of injustice and lead to the greatest hardship."

BANK OF SONOMA COUNTY V. GOVE.

(63 Cal. 355.)

Negotiable instrument — transfer — equities.

An indorser of an accommodation note before maturity having transferred the note after maturity, and himself not being affected by equities between the original parties, his transferee takes the note free from such equities.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

C. V. Gray, for appellant.

A. W. Thompson, for respondent.

McKINSTRY, J. The appellant Gove made his promissory note for \$800 to defendant Stuart, who indorsed it before maturity to the National Gold Bank and Trust Company. The bank discounted the note in the regular course of its business. After maturity, the bank for a valuable consideration transferred the note to E. W. Steele. Subsequently Gove, the maker, paid to Steele one-half the sum then due upon the note, claiming that as between himself and Stuart the instrument was an accommodation, and each was liable to the other for one-half only. Steele refused to recognize the alleged claim, but consented to receive the sum paid as a partial payment, and such sum was indorsed as a payment in the usual manner. Afterward Steele transferred the same for value to the plaintiff.

As between themselves there was an agreement between Gove and Stuart that each should pay one-half the note, but of this neither the National bank, Steele, nor the plaintiff, had notice when they respectively bought the note.

This action was commenced August 30, 1877. Defendant Stuart was discharged from his debts under the insolvent laws

Bank of Sonoma County v. Gove.

June 27, 1879, and judgment went for him in the court below. That court gave judgment in favor of the plaintiff for the balance due against the appellant Gove.

Upon this state of facts, it is contended by appellant the judgment should be reversed, because plaintiff was chargeable with notice that the note was an accommodation note, and that the maker had paid all he was liable to pay to Steele. Appellant relies upon the proposition laid down in *Vinton v. Crowe*, 4 Cal. 309, and approved in *Hayward v. Stearns*, 39 id. 58. In the first of these cases the proposition is thus stated: "A negotiable note, taken by the holder after its maturity, is taken subject to all subsisting equities between the maker and payee, but not such as subsisted between the maker and any intermediate holder."

The facts in *Vinton v. Crowe* are not reported, but in *Hayward v. Stearns* the defense relied upon the fact that while the note remained in the hands of Turner, who took after it was overdue, the latter became indebted to the maker in a sum greater than the amount of the note. There can be no doubt the law was properly applied in that case, and it must be supposed that the facts in *Vinton v. Crowe* were analogous. At all events, the general language employed by the court is not to be interpreted as establishing that every indorsee who takes a negotiable instrument after maturity is bound by the equities subsisting between the payer and payee; if indeed the fact, that as in the case before us, the note was made for the mutual accommodation of the original parties, can be considered as an equity within the meaning of the rule.

"It is a settled principle that if the party who transferred the instrument to the holder acquire the note before maturity, and was himself unaffected by any infirmity in it, the holder acquires as good a title as he held, although it were overdue and dishonored at the time of the transfer." Dan. Neg. Inst., § 726, citing many American cases; Chitty Bills (13th Am. ed.), 250; 9 Ex. 690.

Here the note was discounted by the National bank before it became due, without notice of the agreement between the original parties.

In England it is well established that the general rule, that the purchaser of overdue paper can stand in no better position than his transferrer, does not apply so far as to invalidate bills and notes drawn, indorsed, or accepted for accommodation, overdue at

Bryce v. Joynt.

the time they are negotiated or transferred, it being considered that parties to accommodation paper hold themselves out to the public by their signatures, to be bound to every person who shall take the same for value, the same as if it were paid to themselves. And the fact that the purchaser knew that the paper was so drawn, indorsed, or accepted for accommodation, does not weaken his position. 9 Ex. 690. But inasmuch as the decisions in the United States do not uniformly follow the English rule, and as the facts of the case at bar do not demand a decision of the question, we express no opinion with respect to this last point.

Judgment and order affirmed.

Affirmed.

Ross, J., concurred; McKee, J., concurred in the judgment.

BRYCE v. JOYNT.

(88 Cal. 375.)

Evidence — of partnership — firm books.

To prove a partnership the partnership-books alone are not competent evidence, but in connection with evidence tending to prove the partnership and access to and knowledge of the books, are competent.

THE opinion states the case.

E. W. McGraw, for appellant.

Chickering & Thomas and *Wm. M. Pierson*, for respondents.

McKEE, J. In this case the only issue raised by the impleadings involved the question: Whether Oren Joynt, the appellant, was at the dates of the transactions in controversy a copartner with the other defendants in the firm of Hubbard Ward & Company. The transactions with the company took place in March, 1877.

At the trial of the issue, after evidence had been given on behalf of the plaintiffs, tending to prove that on the first of March, 1876, Oren Joynt, George C. Joynt and Hubbard Ward formed a partnership, under the firm name of Hubbard Ward & Co., and that in March, 1877, Oren Joynt was still a member of the firm and continued therein until the failure of the firm in the fall of 1877,

Bryce v. Joynt.

counsel for the plaintiffs proved the identity of the cash-book, journal and ledger of the firm, and in connection therewith gave evidence tending to prove that the defendant, during the years 1876-77, had had access to the books, and on several occasions had examined them and caused balance sheets to be taken from them and rendered to him. Upon that evidence the plaintiffs then offered some of the entries in the books and the books themselves as evidence, and over the objections of the defendant the court admitted them and the ruling is assigned as error.

In and of themselves the books were not admissible for the purpose of proving partnership. Until there was evidence of the fact, at the times of the entries on the books, the entries are to be regarded as *res inter alios*, mere declarations of a third person, not made under oath, which are not binding and are inadmissible to prove the fact. Partnership, like agency, must be proved by evidence *aliunde*. But when there is such evidence, sufficient in the judgment of the court to lay the foundation for the admission of corroborative evidence, then the books and the entries therein may be admitted as the acts and declarations of parties between whom such a relationship exists. *Abbott v. Pearson*, 130 Mass. 191; *Robins v. Wards*, 111 id. 244; *McNeill's Ex'rs v. Reynolds*, 9 Ala. 313.

The case of *Hale v. Brennan*, 23 Cal. 512, like the case in hand, involved a question of partnership, i. e., whether there existed, between the plaintiff and the testator of the defendant in the case, a copartnership in the business of keeping a hotel. At the trial it was admitted that the plaintiff was owner of one-half of the hotel; evidence was also given tending to prove that the business had been carried on and the books kept in the name of the "Santa Cruz Hotel;" that the entries in the books had been made by the testator and the clerk of the hotel, and that after the death of the testator the plaintiff had taken possession of the books. Upon that proof the books were offered and admitted in evidence, and it was held they were properly admitted. "They may," say the court, "have offered very little evidence upon the main question; *

* * but if they afforded any they were admissible."

[Minor matters omitted.]

Judgment and order affirmed.

Judgment affirmed.

McKINSTRY and Ross, JJ., concur.

Eggers v. Hink.

EGGERS V. HINK.

(88 Cal. 445.)

Trade-mark — "Philadelphia beer."

A business sign with a row of beer barrels painted on it, with the letters "P. B." on the heads, the words "Depot of the Celebrated" above, and the words "Philadelphia Beer" below, cannot be protected as a trade mark *per se*.*

ACTION for violation of a trade-mark. The opinion states the case. The defendant had judgment below.

John H. Dickinson, for appellant. .

William Leviston and *T. D. Riordan*, for respondent.

PER CURIAM. The action is to recover damages for a violation of the plaintiff's alleged trade-mark, and to restrain the use of it by the defendant in the future. The sufficiency of the complaint is the question for consideration. According to its averments the plaintiff is engaged in conducting a saloon business in the city and county of San Francisco, particularly for the sale of a certain kind of beer known as Philadelphia beer; and what he seeks to protect as a trade-mark, and which is used by him as a sign over the doors of his place of business, and as a label for the beer bottled by him, consists of a row of beer barrels so painted upon the sign and printed upon the labels as to show the top-head and outline of each barrel, with the letters "P. B." indicating and standing for Philadelphia beer, stamped or printed upon the head of each barrel, together with the words "Depot of the Celebrated" over, and the words "Philadelphia Lager Beer" below the row of barrels. The act of the defendant complained of is the erection by him over his place of business of a sign similar to that of the plaintiff, the chief difference being the insertion of the letters "F. B.," indicating and standing for "Fredericksburger beer," in lieu of the letters "P. B.," and the insertion of the word "Fredericksburger" where the word "Philadelphia" appears on the sign and label of the plaintiff.

* See note and references, 47 Am. Rep. 648; *Desmond's Appeal*, note.

Eggers v. Hink.

The object of a trade-mark is to indicate by its own meaning, or by association, the origin or ownership of the article to which it is applied. Section 991 of our Civil Code provides:

“One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade-mark, any form, symbol, or name, which has not been so appropriated by another, to designate the origin or ownership thereof, but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on.” And by section 3196 of the Political Code it is declared:

“The phrase ‘trade-mark’ as used in this chapter includes every description of word, letter, device, emblem, stamp, imprint, brand printed ticket, label or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant or tradesman, to denote any goods to be imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description.”

We do not perceive that either the letters or words upon the plaintiff's sign or label, or the device as a whole, in any manner indicated origin or ownership. A sign placed over a man's place of business with a row of beer barrels painted on it would indicate that he sold beer; the letters “P. B.” stamped on the head of the barrels, and the words “Depot of the Celebrated” placed above, and the words “Philadelphia Beer” placed below the row of barrels, would indicate that he sold Philadelphia beer. It does not appear that the plaintiff is the manufacturer of the Philadelphia beer or the sole agent for its sale. For ought that appears any one else has as much right to sell Philadelphia beer as the plaintiff. In our opinion the sign and label of the plaintiff relates only to the description of the beverage dealt in by him, and therefore cannot be protected as a trade-mark.

Judgment affirmed.

City and County of San Francisco v. Central Pacific Railroad Company.

CITY AND COUNTY OF SAN FRANCISCO V. CENTRAL PACIFIC
RAILROAD COMPANY.

(68 Cal. 467.)

Constitutional law — construction — "roadway, roadbed."

Steamers used by a railroad company in transporting freight cars across water intervening between the termini of the tracks are not taxable as a part of the "roadway" or "roadbed."

THE opinion states the case.

McAllister & Bergin, for appellant.

Walter H. Levy, for respondent.

THORNTON, J. The decision in this case is as follows: "First. That the assessments mentioned in the complaint in said action were made in due form, and at the proper time, by the assessor of the city and county of San Francisco; and all the forms of law in relation to the assessment of property for taxation in said county have been complied with on the part of said assessor.

"Second. That the defendant is a corporation existing under the laws of the United States, and of this State, and as such is now, and for many years last past has been, the owner of a line of railroad known as the Central Pacific railroad, extending from a point in the city of San Francisco, in the State of California, to Ogden, in the Territory of Utah; that the length of said road in the city and county of San Francisco is four miles from a point within said city to the eastern shore of the southern arm of the bay of San Francisco; that from said point on the eastern shore of the bay of San Francisco, to a point on the western shore of said bay, where the railway of defendant again commences, is about twelve miles; that across said bay no line of railroad has been constructed; and freight and passengers carried upon said road are taken across said bay upon steam ferry-boats; that for more than four years last past, the defendant has owned and possessed the two steamers, to-wit, the Thoroughfare and Transit, mentioned in plaintiff's complaint; that said steamers now are, and ever have

City and County of San Francisco v. Central Pacific Railroad Company.

been, respectively, of the burden of one thousand five hundred and sixty-six and one thousand and twelve tons, and are vessels entitled to be and are, and for more than four years last past have been, enrolled and registered in the port and harbor of San Francisco ; that upon the decks of said vessels are laid railroad tracks, and the said vessels now are, and for more than four years last past have been, exclusively used for the purpose of transporting the cars of the defendant, and used in operating the said railroad across said bay of San Francisco, from the road of defendant on the eastern shore to the same upon the western shore and for no other purpose.

“And as a conclusion of law, from the foregoing facts, the court finds that the plaintiff is entitled to judgment against the defendant herein for the sum of \$1,039.70 and costs.

“And judgment therefor is hereby rendered and directed to be entered.”

The sole question presented for decision herein is whether the steamers *Thoroughfare* and *Transit* mentioned in the above findings are to be assessed by the assessor of the city and county of San Francisco or by the State board of equalization.

The property to be assessed by the board is defined in the 10th section of article 9 of the Constitution of 1879. It is the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in the State.

All property, other than the above-mentioned, is to be assessed by the local assessors. Are the steamers above named embraced within the category of property named in the section above referred to? The relation of such steamers to the Central Pacific Railroad Company is set forth in the findings. They are certainly not the franchise of the defendant corporation. They may constitute an element to be taken into the computation to arrive at the value of the franchise of such corporation, but they are not such franchise. It is equally as clear that they are not rails or rolling stock. These words are to be construed according to their ordinary and popular meaning, and we do not think that it would be contended that rails or rolling stock in their ordinary and popular signification include the steamers above mentioned. Are they then embraced within the words roadway or roadbed, in the ordinary and popular acceptation of such words, as applied to railroads? These two words, as applied to common roads, ordinarily mean the same thing, but as applied to railroads their meaning is not the

same. The roadbed, referred to in section 10, in our judgment, is the bed or foundation on which the superstructure of the railroad rests. Such is the definition given by both Worcester and Webster, and we think it correct. The roadway has a more extended signification as applied to railroads. In addition to the part denominated roadbed, the roadway includes whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track. Such space is defined in subdivision 4 of the 17th section and the 20th section of the act "to provide for the incorporation of railroad companies, etc., approved May 20, 1861. Stats. 1861, p. 607; *San Francisco, etc., R. Co. v. State Board*, 60 Cal. 12.

With these views of the signification of the words roadway and roadbed, we do not think they include the steamers above named, and therefore we are of opinion that the assessment of the steamers above mentioned pertained to the local assessor, and was properly made by the assessor of the city and county of San Francisco.

Judgment affirmed.

MYRICK, McKEE, McKINSTRY and SHARPSTEIN, JJ., concurred.

UNGER v. MOONEY.

(68 Cal. 536.)

Adverse possession — tenants in common.

Where a tenant in common conveys the whole land to a third person, and the grantee records the deed and enters under it, makes valuable improvements, pays the taxes, and receives the rents and profits without offering to account, the cotenant is chargeable with actual notice, and the possession is effectual against him.

ACTION to recover land. The opinion states the facts.

Mastick, Belcher & Mastick and Roche & Desbeck, for appellants.

Wm. H. Sharp, for respondent.

THORNTON, J. This is an action to recover possession of an undivided half of a lot of land situate in the city and county of San

Unger v. Mooney.

Francisco, to which the statute of limitations was pleaded. The court held against the defendants on this plea, and judgment passed for plaintiff. The defendants moved for a new trial, which was denied. One of the grounds on which this motion was denied was the insufficiency of the evidence to sustain the finding on the issue joined on the plea of the statute above mentioned.

The findings of fact, so far as they are adverted to or necessary to be remarked on herein, are as follows :

“ 1. That one Frederick S. Sproul, on the 1st day of December, in the year 1863, was the owner in fee and in possession of the lot of land described in the complaint in this action.

“ 2. That said Frederick S. Sproul and Phebe C., his wife, on the 27th day of February, in the year 1865, granted, bargained and sold said premises to James Brokaw and J. W. Metcalf, by deed duly recorded on the same day, who entered into the possession of said premises under said deed.

“ 3. That said Frederick S. Sproul, Phebe C. Sproul, his wife, and James Brokaw, on the 2d day of January, in the year 1867, granted, bargained and sold said premises to Thomas Mooney, who entered into the possession of said premises under said deed, and while he held the same paid the city, county and State taxes levied thereon, added to the improvements thereon, and received the rents and profits thereof.

“ 4. That said Thomas Mooney, on the 15th day of December, in the year 1868, made a deed of gift of said premises to his wife, Emily Mooney, one of the defendants in this action, which deed was duly recorded on said last named day. That said defendant entered into possession of said premises under said deed, and has ever since held the possession thereof by herself or tenants, and received the rents and profits thereof, and paid the city, county and State taxes imposed thereon.

“ 5. That said J. W. Metcalf, on the 13th day of November, in the year 1880, by deed duly acknowledged and recorded, granted, bargained and sold the undivided one-half of the premises described in said complaint to the plaintiff.

“ 6. That the defendants, on the 4th day of March, in the year 1881, ousted the plaintiff, and denied his title to the premises described in said complaint, and in and to every part thereof.”

The court, it will be observed, finds that the plaintiff was ousted or disseised on the 4th day of March, 1881. The denial of the

title, also found, is either a mere evidential or probative fact, having no proper place in a finding of facts, or if it has, is of the same purport with the fact of ouster previously found. In this latter view, it is a mere repetition of the finding of ouster, and need not be further noticed.

It is contended that the evidence shows that the disseisin or ouster of plaintiff by defendants was at a much earlier day ; in fact, that the testimony establishes that the ouster occurred on the entry of Thomas Mooney under the deed executed to him on the 2d day of January, 1867 (see finding three), by Sproul and wife and Brokaw.

To set the statute of limitations in motion there must be a hostile possession, open and notorious or accompanied by such circumstances as are calculated to make it notorious. *Grimm v. Curley*, 43 Cal. 251 ; *Thompson v. Pioche*, 44 id. 508. This accords with the definition of disseisin, which Blackstone defines to be "a wrongful putting out of him who hath the freehold." 3 Bl. Com. 169 — and so, Littleton and Coke. The definition of the former is "where a man entereth into any lands or tenements where his entrance is not congeable and ousteth him who hath the freehold." Co. Litt. 279. Coke defines it as "the putting a man out of possession, and ever implieth a wrong." Co. Litt. 153. It must be with intent to usurp the place of the true owner, and put him out of possession. Lord MANSFIELD in *Taylor v. Horde*, said that disseizin at common law "signified some mode or other of turning the tenant out of his tenure, and usurping his place and feudal relation," from which it followed, that if the disseisor died seised, the descent to his heir gave him the right of possession, and tolled or took away the true owner's entry. *Taylor v. Horde*, 1 Burr. 60. This was said of actual disseisins, or disseisins in spite of the owner, and not of disseisins at the election of the owner, which were allowed to the owner for the sake of the remedy by assize of novel disseisin. This actual disseisin is the species of ouster or dispossession by reference to which adverse possession is defined and illustrated. The last class of disseisins above mentioned need not be further noticed.

In fine, we think that the authorities justify our saying that every dispossession of the true owner, whether by force or fraud, by violent or peaceful means, and an open or notorious occupation under claim of title in the person who dispossesses, is a disseizin or ouster (disseisin is but a species of ouster, see 2 Bl. Com.) sufficient to set in motion

Unger v. Mooney.

the statute of limitations and constitutes an adverse possession, which when it continues for the period of time prescribed by statute bars the owner of his right to recover.

Now the possession of one tenant in common is the possession of his co-tenant. Such possession by one tenant has no element of hostility to the right of his co-tenant. The co-tenant out of possession is not informed by such possession that it has any adverse character. Such a possession under claim of title adverse to the co-tenant, but not manifested to him by the conduct of the possessor of a character to notify the co-tenant of its adverse nature, is not sufficient to set the statute in operation as between tenants in common. The co-tenant must in some way be notified of the adverse holding, in order to be prejudiced by it. This may be by actual notice, or by acts or declarations so open and notorious that it may be inferred that the co-tenant had knowledge of them. This rule and the reason on which it is founded is well stated in *Miller v. Myers*, 46 Cal. 539, referring to the tenant out of possession in these words: "But until he has notice, either actual or constructive in some form, that the possession of his cotenant has become hostile, it will be deemed in law to have been amicable, notwithstanding the tenant in possession may in fact have been holding adversely. If the rule were otherwise the tenant out of possession might be disseised and lose his remedy by the bar of the statute of limitations, without notice that the possession of his cotenant had become hostile. To avoid this injustice, the law deems the possession to have continued amicable until the tenant out of possession has in some method been notified that it has become hostile."

The adverse character of the possession must in every case be manifested to the owner. The owner must be notified in some way that the possession is hostile to his claim, or the statute does not operate on his right. See remarks in opinion in *Thompson v. Pioche*, 44 Cal. 517, 518; *Trustees, etc., Town of Fort Hampton, v. Kirk*, 84 N. Y. 220; s. c., 38 Am. Rep. 505; *Culver v. Rhodes*, 87 N. Y. 354; *Abell v. Harris*, 11 Gill. & J. 371, per DORSEY, J. As was said in the case cited from 84 N. Y., per ANDREWS, J., "the object of the statute defining the acts essential to constitute an adverse possession is that the real owner may by unequivocal acts of the disseisor have notice of the hostile claim and be thereby called upon to assert his legal title." Hence an open and notorious occupation with hostile intent is a necessary constituent of an adverse possession.

Neither a hostile intent without such occupation, nor such occupation without hostile intent, is sufficient. The case of tenants in common is no exception to this rule. The evidence required is of a different character, from the legal character of the tenure, tenants in common being seized *per my et per tout* and the actual occupation of one tenant of the entire tract having no element of hostility to his cotenant. Such occupation with user of the land for husbandry, or of any kind, is reconcilable with right and in harmony with the legal aspects of the tenure. Hence there must be some conduct of the occupying tenant, evidenced by acts or declarations or both, in its nature and essence hostile to the title of the tenant out of possession, and imparting knowledge of such hostility to the latter to affect his right. *Portis v. Hill*, 3 Tex. 278.

The important question here is, does the evidence show an ouster prior to the date at which it is found, and an adverse possession of sufficient duration to bar the plaintiff's action ?

The facts found are set forth above, together with the further fact not proved, that Emily Mooney paid the taxes during the whole time that she was in possession. We do not say this payment of taxes was proved, because the bill of exceptions shows that the offer was made to prove it, and it was ruled out, except as to the fact of payment since March, 1878, when the proviso to section 325 of the Code of Civil Procedure went into operation. The payment of taxes, it seems, is, under the circumstances of this case, competent evidence, along with the other facts admitted, to show the character of the holding by the party in possession, that it was adverse and under claim of title. *Keyser v. Evans*, 30 Penn. St. 509.

The evidence shows the entry by Thomas Mooney under a deed executed to him by Sproul and wife, and Brokaw, conveying the whole premises, which deed was duly recorded soon after its execution. This is strong evidence of an ouster or disseisin. It bears the appearance of a declaration by the grantee that his entry under the deed is for himself exclusively, and not for another, that he enters in his own exclusive right. In *Prescott v. Nevers*, 4 Mas. 330, Judge STORY, in discussing the subject of the ouster of one tenant in common by another, used this language: "I take the principle of law to be clear, that where a person enters into land by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have a seisin of the land co-extensive with the boundaries stated in his deed, where there

Unger v. Mooney.

is no open adverse possession of the land so described in any other person." This was said in 1827. Afterward, at the January term, 1845, of the Supreme Court of the United States, the same learned jurist, delivering the opinion of the court in *Clymer's Lessee v. Dawkins*, 3 How. 690, expressed himself thus: "In the case of the *Lessee of Clarke v. Courtney*, 5 Pet. 319, 354, this court also held, that when a person enters into land under a deed or title, his possession (in the absence of all other qualifying or controlling circumstances) is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised to the extent of the boundaries of such deed or title." The learned justice cites several other cases "affirming the same doctrine," viz.: *Green v. Litor*, 8 Cr. 229, 230; *Barr v. Gratz*, 4 Wheat. 213, 223; *Society for Propagating the Gospel v. Town of Pawlet*, 4 Pet. 480, 504, 506; *Blight's Lessees v. Rochester*, 7 Wheat. 535. See also *Bradstreet v. Huntington*, 5 Pet. 439; *Clapp v. Bromagham*, 9 Cow. 531, 532, 533; *Culler v. Motzer*, 13 Serg. & R. 358; 15 Am. Dec. 604; *Wright v. Saddler*, 20 N. Y. 329, 330; *Alexander v. Kennedy*, 19 Tex. 496.

In *Culler v. Motzer*, 13 Serg. & R. 358, it was held where the very point was in judgment that possession of land by a purchaser, under deed of an entire lot, is adverse to the rightful owner, though tenant in common with the grantor. There are numerous other cases to the same effect. *Horne v. Howell*, 46 Ga. 9; *Cain v. Furlow*, 47 id. 674; *Gill v. Fauntleroy's Heirs*, 8 B. Monr. 186; *Long v. Stapp*, 49 Mo. 508; *Warfield v. Lindell*, 30 id. 282; s. c., 38 id. 578; *Lapeyre v. Paul*, 47 id. 590; *Gray v. Bates*, 3 Strob. 500; *Bogardus v. Trinity Church*, 4 Paige, 178; *Bigelow v. Jones*, 10 Pick. 162; *Goewey v. Urig*, 15 Ill. 242; *Hinkley v. Green*, 52 id. 230-233; *Townsend & Pastor's case*, 4 Leon. 32; *Reed v. Taylor*, 5 Barn. & Adol. 575; *Parker v. The Proprietors, etc.*, 3 Metc. 101; *Thomas v. Garvan*, 4 Dev. 223; 25 Am. Dec. 708; *Cloud v. Webb*, 4 Dev. 290; *Hubbard v. Wood*, 1 Sneed, 286; *Weisinger v. Murphy*, 2 Head, 674; *Kinney v. Slatterly*, 51 Iowa, 353; *Abernathie v. Con. Virginia Mining Co.*, 16 Nev. 260; *Caperton v. Gregory*, 11 Gratt. 505.

The deed to Mooney (its character is stated above) was recorded, and Mooney entered under it into a lot within the city of San Francisco, described in the complaint as being twenty-three by ninety feet.

[Omitting details of evidence.]

Unger v. Mooney.

Each one of these elements is established by the evidence. (1) There was open and notorious occupation by Mrs. Mooney and her husband. Mrs. Mooney and her husband were in possession when the deed was made to the former in December, 1868. They lived there for several months. Mrs. Mooney took possession in December, 1868. Her husband added to the house, raised it to a two-story house. Mrs. Mooney has let the house during this period to several tenants, and a tenant has occupied the house during nearly the whole period. She has made repairs on the house, improved it at a cost of from \$1,800 to \$2,000, received the rents of the property, paid taxes and assessments, has never accounted to any one, and no one ever demanded an account or to be let into possession until within a short time before the suit was brought. The deeds under which she claims and herself and her husband entered were recorded soon after made. Her acts of ownership and those of her husband were unequivocal and open to the observation of all, and during this period Metcalf, the alleged tenant in common, lived near enough to the city to have reached it in less than twelve hours, and had full opportunity of observing the condition of the lot, the change of possession from Brokaw, his cotenant, so-called, or that a person other than Brokaw was in possession, its occupation by tenants, and of ascertaining all the above-mentioned facts, which facts a man ordinarily regardful of his interests would have made himself acquainted with. The possession of other persons than Brokaw was enough to put Metcalf on inquiry, according to the rule in *Fair v. Stevenot*, 29 Cal. 486. If he had inquired he would have discovered the hostile character of the possession. This means of notice constituted notice. See *Smith v. Yule*, 31 Cal. 184; *Pell v. McElroy*, 36 id. 272. (2) The hostility of the plaintiff's claim of title is evident from the above facts, for the character of the possession may be evidenced by acts as well as words. Independent of the entry of Mooney and wife under the deeds of the whole lot, such acts indicate the adverse character of the holding. With the deeds we cannot see that there can be any doubt about it.

[Minor matters omitted.]

Judgment and order reversed and cause remanded for a new trial.

Judgment reversed.

MYRICK and SHARPSTEIN, JJ., concurred.

Hearing in banc denied.

Odd Fellows' Mutual Aid Association of San Francisco v. James.

ODD FELLOWS' MUTUAL AID ASSOCIATION OF SAN FRANCISCO
v. JAMES.

(63 Cal. 596.)

Officer — of corporation — liability for money stolen.

The secretary of a corporation, bound to receive its moneys and pay them over to the treasurer, is liable for such moneys stolen from him if he failed to use reasonable diligence in paying them over.

ACTION on a bond. The opinion states the case. The defendant had judgment below.

J. F. Cowdery, for appellant.

R. Thompson, for respondent.

THORNTON, J. This is an action upon a bond for \$5,000 executed by the defendants to the plaintiff, with this stipulation, that whereas Wallace T. James has been elected secretary of the Odd Fellows' Mutual Aid Association for the year commencing on the 5th day of February, 1878, and until his successor shall have been duly elected and qualified, now if the said James "shall in all respects fully, faithfully, well and truly perform all the duties of his said trust according to the constitution, by-laws, rules, and regulations of said association, and at the end of his official term surrender all books, papers, money, or sureties" (*sic*) belonging to or appertaining to his office, to such person or persons as said association may direct, then the bond was to be void, otherwise not.

The breach of the bond assigned in the complaint is the failure of James to pay over to the treasurer of said corporation the sum of \$1,455.25, moneys of the corporation received by him (James) as secretary, while he was in office as such, in the year 1878, and before the 15th of August in that year, which payment to the treasurer it was his duty to make, under the by-laws, rules, and regulations of the corporation. It is further averred that the corporation, by its treasurer, demanded of James the payment of the sum of money mentioned, which he refused to pay to him, and that it has never been paid. None of the allegations of the complaint are denied by the answer, except as hereinafter stated, but

Odd Fellows' Mutual Aid Association of San Francisco v. James.

the defendants set up in defense that the corporation was conducting and carrying on its business in a building known as the Odd Fellows' Hall Building in the city of San Francisco, that James, as secretary, was required by the association to occupy and do the business of the corporation in its office during all the times mentioned in the complaint, that the corporation furnished its office with an iron safe for the purpose of safely keeping its books, papers, and moneys; that in the usual and ordinary manner of doing the business of the corporation, the secretary (James) was accustomed to and did receive the funds of the corporation as the same were paid in from time to time, and deposit them in the safe above mentioned; that it was the usual and ordinary way of conducting the said business for James, the secretary, to allow the said funds to remain in the safe until the treasurer of the corporation called to receive them, that James did receive the sum of money mentioned in the complaint, and as was his usual custom and the custom of doing business, placed the same in the safe aforesaid; that after this money had been deposited in the safe, and before the treasurer called for or made any demands for it or any part of it, some person or persons unknown, in the night time, broke open the safe, and stole and carried away the money, without the knowledge or consent of James, and without any neglect or default on his part. The defendants further aver that James, in all things and at all times, faithfully performed all the duties of his trust according to the constitution, by-laws, "and usages of the said association"; that at the time the treasurer made the demand on him he did not have the sum of money mentioned, and that it was not his duty to pay over this money, or any part of it, to the treasurer, or in any way reimburse the corporation "for the said loss or any part thereof."

We think it best to insert here the findings of the court below as to the facts of the case, which are as follows :

"That the defendants made, executed and delivered the bond attached to the complaint at the time alleged ; that by the constitution, by-laws, rules and regulations of said association mentioned in the condition of said bond, the secretary, Wallace T. James, was required to keep all the books of account of the association, to receive all the moneys of the association, giving his receipt for the same ; to pay over all moneys in his possession belonging to the association to the treasurer, taking his receipt therefor ; to write .

Odd Fellows' Mutual Aid Association of San Francisco v. James.

and send all notices and communications called for by the rules of the association to its members, to make a written report of the transactions and condition of the association at the annual meeting in each year, and at such other meetings as the board of directors or association should direct ; that there were no other duties which the secretary was required to perform, and that the said bond was given for the performance of these duties, and these only ; that there was no contract or undertaking whatever by which the said James undertook or agreed to be the insurer of moneys or goods in his charge, or received by him as secretary ; but that his undertaking, with reference to the custody of the moneys received by him as secretary, was to keep them, under the direction of the association and in the place and manner directed by the association ; that said James was furnished by the association with an office, in which was a safe for the purposes of the transaction of business, and the custody of money and other valuables ; that during the continuance of his term of office the said James received money to the amount of \$1,455.25, and deposited the same in the said safe furnished by the said association ; that while in said safe and during the night of August 6, 1877, the said office was broken into and said money stolen by some unknown person, without the knowledge, agency or assent of said James.

“ And the court finds as a fact that the said James was not guilty of any negligence in the custody or care of said money, but that he faithfully performed all the duties of his said office ; that he failed to pay over said \$1,455.25, solely because the same was stolen from him as above found ; that the said safe and office was not a fit or proper place for the keeping of said money, but that it was the place provided by the association for the purpose, and that the fact that it was not a proper place for the keeping of said money was known to the association at all times previous to the robbery above mentioned.”

Judgment passed for defendants following the conclusions of law arrived at by the court.

The court below treated the case as one for the custody and safe-keeping of moneys by the secretary, which it clearly is not, any further than this : that he was to keep the money for such reasonable time as was required for him to deposit it with the treasurer. There is no such contract on the part of the defendant. The contract of defendant as shown by the bond, which was admitted as set

Odd Fellows' Mutual Aid Association of San Francisco v. James.

forth by the complaint and as found by the court, was to receive the moneys of the association and pay them over to the treasurer, taking his receipt for the same.

[Omitting review of evidence.]

The engagement of the defendant James, as shown by the bond, was in all respects "fully, faithfully, well and truly, to perform all the duties of his said trust according to the constitution, by-laws, rules and regulations" of the association; and as we have stated above, his duty as to the moneys was to receive all the moneys of the association, giving his receipt for them and pay them over to the treasurer, taking his receipt therefor. This is the proper meaning of the bond in regard to the moneys. He was no custodian or bailee of the moneys further than as set forth above. He was such bailee for such time as was requisite in the use of due and proper diligence under the circumstances to get the money to the treasurer and pay it over to him. James was a paid officer, receiving a salary of \$100 a month, and his engagement as to diligence in the brief period that the money should remain in his possession was that of a good and trustworthy business man in attending to his own affairs. He engages to use this diligence in keeping the money and paying it over. The degree of diligence to be employed must have regard to the circumstances, of course.

In the case before us the moneys lost were allowed to accumulate for more than a month. It was the secretary's duty to pay over within a reasonable time. His diligence should have been spurred by the fact that the treasurer was the officially appointed custodian of the moneys, and he (the secretary) was not. Under the circumstances before us in this case, he was bound to pay over in our opinion on the day he received the money if practicable, at furthest on the day after he received it. This he did not do, but allowed the money to accumulate and it was stolen. This was a breach of his engagement under the bond, and rendered him and the other defendants liable. It may be, that if while keeping the money during the brief time he was allowed to keep it, and exercising proper care in keeping it, he had lost it by robbery accompanied by violence which overcame him, or if while taking the money in the exercise of due and proper care to the treasurer, he was violently robbed of it, against his will and consent, he might be excused. Such was the case of *Walker v. British Guarantee Association*, 18 Q. B. 277, which was an action by the trustees of a building society

Odd Fellows' Mutual Aid Association of San Francisco v. James.

under an act of Parliament, against the sureties of one Jones, the treasurer of the society, on a covenant whereby it was stipulated that Jones would faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duty, and punctually account to the trustees for all moneys, etc., received by him as treasurer. One of the directions of the society in regard to the treasurer's duties was that he should pay over the moneys to the bankers of the society within a given time. The breach assigned was that Jones did not pay over the money to the bankers or at all. The defendants pleaded four pleas. The fourth plea which was the one on which the case turned and was decided, was that Jones had received the money, and before the time that he ought to have paid or could have paid it to the bankers of the society, he was, without any act or default or negligence or want of due and proper care on his part, robbed by violence of the money, by which he was prevented from paying. There was a verdict for the plaintiffs on three of the pleas, and on the fourth verdict passed for the defendant. There was a motion for judgment for plaintiffs *non obstante veredicto*, which brought up the sufficiency of the plea. The court denied the motion, and per CAMPBELL, C. J., said: "The plea avers, that after he received the moneys, and before the time when he ought to have paid, or could have paid, the same to the bankers, he, without any default or negligence or want of due care on his part, was robbed by violence of the whole of the said moneys, by the same being feloniously and violently stolen and carried away from his person; and thereby he was unavoidably, and without any act or default of his, prevented from paying the said moneys to the bankers of the society. This plea (found to be true) alleges a loss of the moneys by irresistible violence; and the general doctrine is not denied, that if the subject-matter bailed be lost by *vis major*, which we translate irresistible violence, the bailee is discharged."

The defense was here sustained on account of the diligence of the treasurer. He was doing his best to comply with his engagement and was prevented by the *vis major*. If he had been dilatory in taking the money to the bankers, it cannot be supposed that the court would have sustained his defense.

There is here nothing like robbery nor violence, nor inevitable accident, nor *vis major*, to excuse defendant, but a case where the money has been lost by the want of care and prudence on the part

Odd Fellows' Mutual Aid Association of San Francisco v. James.

of James, which his contract bound him to use, and he and his sureties are liable. In the case of the act of God, or inevitable accident, or *casus* (as the civilians call the act of God or inevitable accident), Whart. Neg., §§ 114, 115, 116, 117, etc., or *vis major*, the defendant is not excused when the injury or damage might have been avoided by the exercise of due care and prudence on the part of defendant, as is illustrated in many cases. See *Polack v. Pioche*, 35 Cal. 423; *Chidester v. Consol. Ditch Co.*, 59 id. 202, 203; *Holladay v. Kennard*, 12 Wall. 254, case of common carrier, and *City of Philadelphia v. Gilmartin*, 71 Penn. St. 140; Whart. Neg., § 123.

Judgment and order reversed, and cause remanded for a new trial.

Reversed and remanded.

MYRIOK and SHARPSTEIN, JJ., concurred.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

SMITH v. SIMMONS.

(108 Penn. St. 33.)

Municipal corporation — nuisance — ditch in street — contractor.

A ditch dug in a street of a borough, to lay a water-pipe from a spring to a dwelling-house, by authority of a municipal license, is not necessarily a public nuisance, rendering the licensee liable for the negligence of an independent contractor in performing the work.*

ACTION for personal injury by negligence. The opinion states the point. The plaintiff had judgment below.

Blakeslee, Davies and W. M. Post, for plaintiff in error.

McCollum and Watson, for defendant in error.

GORDON, J. This case presents two main questions for our consideration and resolution, and these being determined, all others raised by the assignments may be passed as of minor consequence. Was the digging of the ditch in the public street of the borough of Susquehanna a nuisance *per se*? If not, if it was such a necessary work as was properly licensable by the borough council,

* See *Crandall v. Loomis*, 56 Va. 664.

then, as the second question, was the defendant chargeable with the negligence of his contractor who had charge of the work? It is certainly true that if the premise assumed by the court below be correct the conclusion adopted by it follows as a matter of course. If the ditch dug for and at the instance of Dr. Smith was a public nuisance, then he and all engaged in sinking it were responsible for all damages resulting from it, and the doctrine of *respondet superior* is out of the case. But we do not think it was *per se* a nuisance; such a work that the borough council had no power to permit. This ditch was dug for the purpose of laying a pipe for the conveyance of water from a spring to one of the defendant's houses on Willow street. Water is one of those prime necessities without which people cannot live, and the public streets of towns and cities have, from time immemorial, been used as a means for its production or conveyance. Formerly it was very common for the citizens of the various municipalities to sink wells for this purpose on the public thoroughfares, and this, as was said by Chief Justice GIBSON, in *Barter v. Commonwealth*, 3 P. & W. 253, was by sufferance and in subjection to the corporate franchise. In these days, when water-works are common to all the larger towns, pipes are laid in the streets from which the water supply is drawn both for public and private uses, and although the right thus to lay pipes is usually accorded to a corporation, it by no means follows that it might not be done by private persons acting under municipal authority. Necessity, as was held in the case of the *Commonwealth v. Passmore*, 1 S. & R. 217, justifies many actions which would otherwise be nuisances. No one has the right to throw wood or stones in the street at his pleasure, nevertheless, as building is necessary, building materials may be laid therein for a reasonable time and in a convenient manner. So may a merchant occupy the street with his goods; in like manner may the common highways be temporarily opened for the purpose of building vaults under them, or under like regulations, private drains may be connected with the common sewers or gutters, or houses and other buildings with the streets, by-alleys, door-steps, and the like. By such things as these and many others, which are justified by necessity or custom, may public highways be occupied temporarily or permanently, and it would be strange indeed if in the face of all this array of precedents a private citizen, acting under municipal license, could not, without committing a public nuisance, lay a

Smith v. Simmons.

water-pipe along a street to his house. Such strictness as this would, in some of our county villages, deprive the inhabitants of their water supply altogether, and would, in many other instances seriously interfere with the business and comfort of our people.

From considerations of this kind we are compelled to dissent from the ruling of the court below on this question of nuisance and to hold, on the contrary, that the digging of the trench, complained of in this case, under the license of the borough council, was not such an act as of itself rendered the parties engaged in it guilty of a public wrong.

Having arrived at this conclusion, the question that next presents itself is that involving the responsibility of the defendant. If however the testimony of Jonas Florence, the contractor, is to be believed, Dr. Smith was not his responsible superior. Florence undertook the whole job for the compensation of \$25, and the defendant had nothing to do except furnish the pipe and the box in which it was to be inclosed. With Florence, in the execution of this contract, he could no more interfere than he could about a job in which he had no interest. He might advise but the contractor could receive or reject that advice as he saw fit ; he might put a fence around the ditch whilst in process of construction, and Florence might treat it as an obstruction and remove it. In other words, Dr. Smith could not control the execution of the contract. He was entitled to a finished job, but it was not his business to see to or regulate the manner of its doing. The case is evidently governed by *Harrison v. Collins*, 86 Penn. St. 153 ; s. c., 27 Am. Rep. 699 ; wherein it is said, by Mr. Justice MERCUR : " If one renders service, in the course of an occupation, representing the will of the employer only as to the result of the work and not as to the means by which it is accomplished, it is an independent employment." But certainly, in the case under consideration, Florence was the subordinate of the defendant in nothing but the design, whilst in every thing which pertained to the execution of the work he was the chief and only director and executor, and it hence follows that for his negligence the court ought not to have held the defendant responsible.

We therefore think, without particularizing as to the assignments of error, the court should have instructed the jury that if they believed the uncontradicted evidence on the part of the defendant,

Thompson v. Allen.

as to the character of his contract with Florence, the plaintiffs were not entitled to their verdict.

The judgment of the court below is reversed and a new venire awarded.

Judgment reversed.

TRUNKBY, J., dissented.

THOMPSON V. ALLEN.

(103 Penn. St. 44.)

Marriage — conveyance by husband to wife.

A voluntary deed of land direct from husband to wife, made in good faith, the husband not being in debt, will be sustained as against a subsequent creditor of the husband, although it was all the land he owned and a large proportion of all his property.*

EJECTMENT. The head-note shows the case. The defendant had judgment below.

Rodney A. Mercur, for plaintiff in error.

Williams and Angle, for defendants in error.

MERCUR, C. J. It is true a deed from a husband directly to his wife is a nullity at common law. Under modern legislation and the application of equitable principles, a wide departure has been made from the common law, in respect to the ability of a wife to acquire and hold property. Her right of acquisition and power of control is not restricted to property obtained from one not her husband. When not in fraud of creditors of the husband a conveyance from him directly to his wife may be sustained on equitable principles: *Coates v. Gerlach*, 44 Penn. St. 43; *Townsend v. Maynard*, 45 id. 198; *Pennsylvania Salt Manufacturing Co. v. Neel*, 54 id. 9; *Rose v. Latshaw*, 90 id. 238.

A husband may not only convey directly to his wife for a valuable consideration, but he may also convey to her as a gift when not prejudicial to his creditors.

* See *Warlick v. White* (86 N. C. 189), 41 Am. Rep. 453.

Muldoon v. Rickey.

The main effort here appears to have been to sustain the conveyance as a sale and purchase for a valuable consideration. Conceding that the subsequent failure of consideration which led to the conveyance weakens this branch of the defense, yet if the conveyance can be sustained without the aid of the original transaction, it may be valid as a gift.

This conveyance is attacked by one who was not a creditor of the husband when it was made. The evidence does not show that he was indebted to any person at that time. The debt under which the plaintiff claims was contracted more than a year thereafter. When the deed was made he had no creditor to defraud. The jury have found that it was made in good faith with no intention to hinder, delay or defraud future creditors, on debts arising from hazardous undertakings. Under these facts he had a right to convey the land as a gift to his wife. She took and may hold it against the claims of all creditors who were neither defrauded nor intended to be defrauded by the conveyance. It matters not that this land was all the real estate he owned, and a large proportion in value of all his property. The conveyance being under seal implies consideration. The assertion of title by the wife against the subsequent creditors of her husband is no evidence of fraud in her prior acquisition of the property. The case was well tried and we discover no error in the record.

Judgment affirmed.

MULDOON v. RICKEY.

(106 Penn. St. 110.)

Malicious prosecution—does not lie without arrest of person or detention of property.

SUFFICIENTLY reported, 44 Am. Rep. 846.

DESMOND'S APPEAL.

108 Penn St. 126.).

Trade-mark — "Samaritan."

"Samaritan" is not a valid trade-mark on medicines.

ACTION for infringement of trade-mark. The opinion states the point. The bill was dismissed below.*

Pierce, Archer and R. P. Dechert, for appellant.

Rowland, Evans and R. L. Ashurst, for appellee.

PER CURIAM — The original bill declares "that the said medicines have been and are distinguished by the names of 'Samaritan's Gift and 'Samaritan's Root and Herb Juices,' and that the said names are the trade-marks of the same together with certain labels and wrappers hereto annexed marked 'Exhibit A,' and by said trade-marks the same are distinguished from all other compound medicines."

It does not aver an imitation or similarity in the appearance of the labels and wrappers. An examination of the two shows they are quite dissimilar in names and appearance. It is true each has the word "Samaritan," but in such different form and combination of words as to preclude one medicine being taken for the other. We do not think the amended bill removes the difficulty of the appellant. The appropriation of the word "Samaritan" in one combination of words does not prevent its being used in all other combinations.

Decree affirmed and appeal dismissed at the costs of the appellant.

Decree affirmed.

* See *Eggere v. Hink*, ante, 96.

COMMONWEALTH v. BRINGHURST.

(103 Penn. St. 134.)

Corporation — right to vote by proxy.

Unless the right is conferred by charter or by-laws, members of a corporation may not vote by proxy.

QUO WARRANTO. The opinion states the point. The defendant had judgment below.

R. C. Dale and Samuel Dickson, for plaintiffs in error.

George R. Van Dusen and W. Heyward Drayton, for defendants in error.

MERCUR, C. J. The relators are stockholders of the Philadelphia Iron and Steel Company. It was incorporated by special act of 12th of April, 1867.

The contention is whether the stockholders may vote by proxy in the annual election of officers of the corporation.

Section 2 of the act declares "the affairs of said company shall be managed by a board of five directors, one of whom shall be the president, who shall be chosen by the stockholders. All elections shall be by ballot, and every share of stock upon which the required installments have been paid shall entitle the holder thereof to one vote." Section 3, *inter alia*, authorizes the corporation to "make all needful rules, regulations and by-laws for the well ordering and proper conduct of the business and affairs of the corporation. Provided the same in no wise conflict with the Constitution and laws of this State or of the United States."

The charter in no wise refers to voting by proxy. No by-law has been adopted authorizing the stockholders to so vote.

In the absence of any express authority in the charter, and without any by-law authorizing it, the question is whether the stockholders may vote by proxy. In other words, is it a power necessarily incident to the corporate rights of the stockholders?

A corporation is the mere creature of the law. It cannot exercise any power or authority other than those expressly given by its charter, or those necessarily incident to the power and authority

thus granted, and therefore, in estimation of law, part of the same. *Wolf v. Goddard*, 9 Watts, 550; *Diligent Fire Co. v. Commonwealth*, 75 Penn. St. 291.

The right of voting at an election of an incorporated company by proxy is not a general right. The party who claims it must show a special authority for that purpose. *Ang. & Ames Corp.*, § 128; *Philips v. Wickham*, 1 Paige, 590. In this case Chancellor WALWORTH says, the only case in which it is allowable at the common law is by the peers of England, and that is said to be in virtue of a special permission of the king. He adds, "it is possible that it might be delegated in some cases by by-laws of a corporation, where express authority was given to make such by-laws regulating the manner of voting." In *People v. Twaddell*, 18 Hun, 427, it was held a stockholder cannot so vote unless expressly authorized by the charter or by-laws. *Taylor v. Griswold*, 2 Green (N. J.), 222, holds that a right of voting by proxy is not essential to the attainment and design of a charter, and even a general clause therein authorizing the company to make by-laws for its government was insufficient of itself to give that right. In *State v. Tudor*, 5 Day (Conn.), 329, there was no clause in the charter authorizing the stockholders to vote by proxy; yet the company made a by-law authorizing them to so vote. The validity of this by-law was sustained by a majority of the court. So in *People v. Crossley*, 69 Ill. 195, effect was given to a by-law of the corporation, authorizing voting by proxy, the by-law not being in conflict with the Constitution and laws of the State.

That a right to vote by proxy is not a common-law right, and therefore not necessarily incident to the shareholders in a corporation, appears to have been recognized in *Brown v. Commonwealth*, 3 Grant, 209, and in *Craig v. First Presbyterian Church*, 88 Penn. St. 42; s. c., 32 Am. Rep. 417.

The selection of officers to manage the affairs of this corporation requires the exercise of judgment and discretion. They must be elected by ballot. The fact that it is a business corporation in no wise dispenses with the obligation of all the members to assemble together, unless otherwise provided, for the exercise of a right to participate in the election of their officers. Although it be designated as a private corporation, yet it acquired its rights from legislative power, and it must transact its business in subordination to that power. As then the relators cannot point to any language in

Smith v. National Life Insurance Company.

the charter expressly giving a right to vote by proxy, and it is not authorized by any by-law, they have no foundation on which to rest their claim. Judgment was correctly entered for the defendants on the demurrer.

Judgment affirmed.

SMITH v. NATIONAL LIFE INSURANCE COMPANY.

(103 Penn. St. 177.)

Insurance — forfeiture — paid-up policy.

Where a policy of life insurance provided that the company, if requested, should "after the payment of premiums for two full years, issue a paid-up policy," but was conditioned to be void for non-payment of premiums when due, *held*, that such request would not be effectual if not made until after a default in payment of premiums.

ACTION of damages for refusal to issue a paid-up policy. The opinion states the case. The defendant had judgment below.

Arthur M. Burton, for plaintiffs in error.

R. C. Dale, S. Dickson and Wm. McGeorge, for defendant in error.

CLARK, J. The policy in suit was issued by the National Life Insurance Company of the United States of America, on the 20th of October, 1868; it was upon the life of William Hastie Smith, to his wife Isabella, in the sum of \$3,000.

The consideration of the contract, apart from the representations made in the application, was the sum of \$46.59, in hand paid, and the semi-annual payment of a like sum, on or before the 20th October and April, in every year, during the continuance of the policy until fifteen full payments were made; the last to be made on the 20th April, 1883.

The policy contained the following provision: "And the said company further agree that after due payment of premiums for two full years, they will, if requested, on the surrender of this policy duly receipted, issue another policy, payable as herein provided, on

Smith v. National Life Insurance Company.

which no further premium shall be required on the life of the person whose life is hereby insured, for as many fifteenth parts of the original amount hereby assured as there shall have been complete annual premiums paid."

The plaintiff paid the premiums regularly for ten years; the semi-annual premium for October, 1878, and those subsequently accruing were not paid. On the 2d of October, 1880, application was made for a paid-up policy for \$2,000, being ten-fifteenths of the amount of the original, according to the provision of the clause above quoted. This application was refused by the company upon the ground that under the express terms of the policy the plaintiffs had forfeited their rights under it by non-payment of premiums. This action was therefore brought to recover damages for such refusal.

In the clause quoted there is no limitation as to the time when a policy must be surrendered in order that the holder may receive a paid-up policy for a fractional part of the original sum, excepting that the surrender must be "after due payment of premiums for two full years."

The policy further provides however: "This policy is issued and accepted by the insured and the holder thereof on the following express conditions and agreements:

"Second, that the premiums shall be paid in cash on or before the days upon which they become due at the branch office of said company in the city of Philadelphia, or to their duly authorized agents, when they produce receipts signed by the president or secretary.

Fifth, that in case of the violation of the foregoing conditions, or any of them, or of the insured dying by his own hand or in consequence of a duel, or in consequence of violating the laws of the United States or of any nation, State or province, this policy shall become null and void, and all payments thereon shall be forfeited to said company."

Under the rule of construction which requires that full effect must be given to every stipulation in a contract, the provision first quoted must be read in connection with the second and fifth conditions. The obvious and natural meaning of these conditions taken together is that unless the premiums are paid on or before the day upon which they become due respectively, the entire policy shall become void; and all payments made shall be forfeited to the

Smith v. National Life Insurance Company.

company. The payment of the premiums constitutes not only the consideration but the condition of the contract.

The provision for forfeiture is not limited to the first two annual premiums, it is general and applies to all. In the previous clauses of the policy the number and amount of these premiums are particularly specified, and the time is fixed for the payment of each, the last being payable on the 20th day of April, 1883. The second condition requires that "the premiums shall be paid in cash on or before the days upon which they become due." There is no discrimination or distinction; the condition is applicable to all. The effect of the second and fifth conditions therefore when read in connection with the previous clause, providing for a surrender of the original and the issue of a paid-up policy, is to abridge its operation and only to give it effect when that surrender is made in the life-time of the policy. That is to say, during some current year for which payment has been made and before or on the day the annual premium is payable. If any condition of the policy is violated the whole instrument by its own terms is rendered null and void; and when the policy became void none of its provisions remained, neither party had any further rights under it.

The policy was however by its terms non-forfeitable, if the assured chose at the proper time to avail himself of the right it secured. He had a special right peculiar to the holder of this class of policies upon discovering his inability to pay at the time fixed by the conditions of his contract to surrender and avoid a forfeiture. That right existed until forfeiture occurred; then all rights ceased.

This construction results from the obvious force of the language employed, indeed the words of the policy admit of no other. A condition in a policy of insurance being the language of the company, must, if there be any ambiguity in it, be taken most strongly against them; if reasonably susceptible of two interpretations it is to be construed in favor of the assured so as not to defeat without plain necessity his claim to indemnity which it was his object to secure; but we discover no ambiguity here, the expression of the policy is clear and its meaning unmistakable. Any other construction would be plainly contrary to the express condition that if "the policy became null and void" all payments made thereon shall be forfeited to said company.

The several contracts upon the construction of which were ruled the cases of *Dorr v. Insurance Co.*, 67 Me. 438; *Johnson v. In-*

Smith v. National Life Insurance Company.

urance Co., 79 Ky. 403; and *Montgomery v. Insurance Co.*, 14 Bush, 51; were not similar in their provisions to that in suit. In each of these cases it was plainly stipulated that if after payment of a certain number of the premiums those subsequently accruing were not paid when due, and forfeiture ensued, the company would still be liable for such part thereof as is proportionate to the annual payments made. These cases are therefore not in point, they are distinguished in this, that they were on policies which were non-forfeitable and which had an acknowledged value after a failure to pay a premium.

The case of *Bussing v. Insurance Co.*, 34 Ohio St. 226, is however in all respects similar to this. The policy in that case contained substantially the same provisions for a paid-up policy, followed by a condition, "that if the amount of any annual premium, herein provided for, is not fully paid, with interest due thereon, on the day and in the manner so provided for, then this policy shall be null and void and wholly forfeited;" and in case the policy "becomes null and void, all payments made thereon, and all dividends and credits accruing therefrom, and remaining unpaid, shall be forfeited to the company;" it was held that the right of the policyholder to make the exchange was required to be exercised during the life of the policy.

"It was not the intention of the parties, in the event of the policy becoming void, on default in the payment of premiums, that it should still remain good as a policy *pro tanto*, for the premiums which had been paid." To the same effect is the case of *People v. Widows' Insurance Co.*, 15 Hun, 8.

In the case of *Winchell v. Insurance Co.* (U. S. C. C. Mass.), 8 Ins. L. J. 651, relied upon by plaintiff in error, the provision for a paid-up policy, and the conditions upon which the original was issued and accepted, are in most respects similar to the provisions and conditions of the policy in suit, but that case is distinguishable from this, in the fact that the condition was expressly "subject to the provisions of chapter 186 of the acts of the legislature of Massachusetts, in the year 1861, entitled 'An act to regulate the forfeiture of policies of life insurance.'"

The statute, referred to, continued in force all life policies for a time reckoned according to their net value, notwithstanding a failure to pay the premiums, provided that notice of the claim and proof of the death should be submitted to the company within

Smith v. National Life Insurance Company.

ninety days after the decease of the assured. The assured had paid eight annual premiums, including that due June 1, 1873; he died December 17, 1877.

The bill alleged that the payments upon the policy were sufficient, under the statute of Massachusetts, referred to in the policy, to continue it in force until after the death of the assured.

The defendants maintained that the two clauses taken together meant that the option must be exercised before there was a forfeiture.

The learned court, LOWELL, J., although admitting the case of *Bussing's Ex'rs v. Union Mutual Life Insurance Co.*, *supra*, was an authority for this construction, and that it seemed to reconcile the apparent discrepancies in the two clauses, and to be consistent with all the words used, "after much doubt" adopts the plaintiff's construction, assigning as a reason for so doing, that "the assured in reading his policy would suppose that he need give himself no uneasiness about the premiums, for that he could always be sure of a policy, as large as those he had paid would warrant." We are inclined to adopt the construction, which is "consistent with all the words used," and "reconciles all apparent discrepancies" rather than one which results from the belief of what the defendant might "suppose" on the reading of the paper. But the court adds "even if we supplied the words, 'while the policy is in force,' the policy was in full force, for the whole amount, when the assured died. It was in force in all respects and to all intents and purposes, and subject to be forfeited if the assured did any act prohibited by the conditions, such as travelling in certain countries, and engaging in certain occupations. In other words, up to this time, it was not forfeited at all, except as to the right of extending it beyond the time to which the statute extended it."

We are of opinion therefore that the court below was right in entering judgment for the defendant, on the demurrer to the defendant's special plea.

[Minor matters omitted.]

Affirmed.

Peoples' Bank of Wilkesbarre v. Legrand.

PEOPLES' BANK OF WILKESBARRE V. LEGRAND.

(108 Penn. St. 309.)

Bank — application of deposit to note.

A bank holding the note of a depositor, his deposit being insufficient to pay it at maturity, is not bound to apply his subsequent deposits, for the benefit of the indorser, although sufficient.

ACTION on a promissory note. The head-note shows the case. The defendant had judgment below.

Henry W. Palmer and Dewitt & Fuller, for plaintiff in error.

Garrick M. Harding and John McGahren for defendant in error.

GREEN, J. [Omitting minor matters.] Another point was made however, though not determined by the court, notwithstanding it was reserved, which, if sound, would still defeat the plaintiff's right of recovery. It grew out of the fact that Lowenstein continued to do business with the bank, and had at various times sums on deposit with the plaintiff sufficient to pay the note. It is contended that these funds being within the power of the plaintiff, an obligation arose to appropriate them to the payment of the note as in favor of the indorser, and this not being done, the latter was discharged. We do not think so. While it is true that a bank is a mere debtor to its depositor for the amount of his deposit, and therefore in an action by the bank against the depositor, on a note upon which he is liable, the latter may set off his deposit, yet we do not think the bank is bound to hold a deposit for the protection of an indorser of the depositor. A bank deposit is different from an ordinary debt in this, that from its very nature it is constantly subject to the check of the depositor, and is always payable on demand. The convenience of the commercial world, the enormous amount of transactions by means of bank checks, occurring on every business day in all parts of the country, require that the greatest facilities should be afforded for the use of bank deposits by means of checks drawn against them. The free use of checks for commercial purposes would be greatly impaired, if the banks could only honor them on peril of relieving indorsers without an investigation of the state of the depositor's liabilities upon dis-

Peoples' Bank of Wilkesbarre v Legrand.

counted paper. This question does not seem to have frequently arisen in the courts, but in three cases out of four, to which we have been referred, the right of the bank to pay out the deposit of the party in default on his paper, without relieving the indorser, has been affirmed.

Thus in Maryland, in the case of *Martin v. Mechanics' Bank*, 6 Harr. & Johns. 235, in an action on an inland bill of exchange by an incorporated bank, as the holder of the bill which they had discounted before it became due, against the payee, evidence was given that the acceptors of the bill, on the day it became due and for a long time before, and for several months thereafter, kept an account at the said bank, by depositing, and from time to time checking out money, and that on the day the bill became due they had no money in bank, but that about a month afterward a balance was struck between the bank and the acceptors, when they had a sum of money sufficient to have discharged the bill. *Held*, that the bank was entitled to recover the amount of the bill from the payee, that the conduct of the holders of the bill with regard to the acceptors was not a waiver of their right against the indorsers nor a release as to them. And as between the holders and the acceptors, there was no payment. The case was elaborately argued by counsel and fully considered by the court. It was held that a deposit of money in a bank by a regular depositor is not to be regarded as an appropriation by him of the money deposited to the payment of an existing indebtedness of his, but rather for the mutual benefit and convenience of the bank and the depositor, "according to the common course of business in our moneyed institutions. On page 247, the chief justice said: "The mere placing money in bank on deposit by the Messrs. Woods had not of itself the effect to discharge the appellant from his liability as indorser of the bill: and not the diverting, by the plaintiffs, the money from the purpose for which it was so placed and received by them in bank, and applying it to the payment of the bill was not more to the prejudice of the indorsers than their forbearing to sue the acceptors, and did not amount in law to a waiver of their right of action against either of the parties." In *Voss v. German American Bank*, 83 Ill. 599, it was held that where the principal on a note payable to a bank has funds on deposit in the bank after maturity, more than sufficient to pay it, the omission of the bank to appropriate the deposit to the payment of the note will not dis-

Peoples' Bank of Wilkesbarre v. Legrand.

charge the surety. In New York, in the case of *National Bank of Newburgh v. Smith*, 66 N. Y. 271 ; s. c., 23 Am. Rep. 48, it was held, that where after the maturity of a promissory note held by a bank, and due protest and notice thereof, the maker makes a general deposit in the bank of an amount sufficient to pay the note, this does not of itself as between the bank and an indorser, operate as a payment. In the absence of any express agreement or directions it is optional with the bank whether or not to apply the money in payment; it is under no obligation to do so. The case of *McDowell v. Bank of Wilmington*, 1 Harring. 369, in the State of Delaware, holds the contrary doctrine, but we think the better reason is with the three preceding cases above cited. It is beyond question that the bank, in the absence of any special appropriation of the deposit by the depositor, would have the right to apply a general deposit to the payment of any existing, matured indebtedness of the depositor. But that privilege is a right which the bank may or may not exercise in its discretion. As before stated, a bank deposit creates a form of indebtedness of a peculiar and exceptional character. It is thus stated in *Morse on Banks and Banking*, 35: "The bank is under the obligation of honoring the customer's drafts and checks whenever the same are presented for payment, provided that at the time of such presentment the balance of the account, if then struck, would show a credit in favor of the customer of funds on which the bank has no lien sufficient to meet the sum called for by the check or draft. The contract so to honor the depositor's orders is implied from the usual course of business. The deposit is made with the tacit understanding that the bank shall respond to the depositor's orders, so long as there is sufficient balance to his credit." It may well be that special circumstances may exist in particular cases, which will convert into an obligation or legal duty, as to indorsers and others contingently liable, that which would otherwise be a mere privilege of the bank. Thus an original direction by the maker, or an agreement between the maker and indorser on the one hand and the bank on the other, that general deposits of the maker should be applied in discharge of the indorsed paper after maturity, or possibly a course of dealing to that effect might suffice to create such an obligation. But in the absence of such circumstances and of special directions, we think that general deposits, made after maturity of the depositor's obligation, are to be treated in the same manner, subject of course to

Peoples' Bank of Wilkesbarre v. Legrand.

the option of the bank, as the same class of deposits made at any other time and before maturity, that is, according to the general usage and understanding prevailing in the commercial world.

We fully recognize the rule that where a principal creditor has the means of satisfaction actually or potentially within his grasp, he must retain them for the benefit of the surety, but we regard the case of bank deposits as an exception to the rule. We are not prepared to say and do not hold, that when the bank has funds of the maker in hand at the time of bringing suit, the indorser may not avail himself of the maker's right of set-off in defense. In such a case the equities of the maker touch the holder directly, and are available to the indorser. Such was the decision of this court in the case of *Sitgreaves v. Bank*, 49 Penn. St. 362, and we know of no reason why that doctrine would not be as applicable to the case of a deposit as to any other form of obligation by the bank to the maker. But in the present case the doctrine is inapplicable, because at the time of bringing this suit it does not appear that the plaintiff held any money of Lowenstein on deposit. In addition to this, it was part of the agreement for extension of the time of payment between Lowenstein and the bank, that he should continue to do business with the bank. If he could not draw out funds deposited he could not do banking business, and we think there is a clear implication from the agreement for extension, that Lowenstein was to be at liberty to draw against his future deposits, notwithstanding the dishonor of the note in suit. Such an understanding would operate against the right of the bank to appropriate such deposits to the payment of the note. In view of these considerations we think the learned court below was in error in not entering judgment in favor of the plaintiff for the amount of the note and interest on the point reserved, in accordance with the verdict of the jury.

Judgment reversed, and now judgment is entered on the verdict in favor of the plaintiff and against the defendant for \$2,977.45, with interest from the date of the verdict and costs of suit.

Judgment reversed.

Enterprise Transit Company v. Sheedy.

ENTERPRISE TRANSIT COMPANY V. SHEEDY.

(103 Penn St. 492.)

Deed — acknowledgment — curing defect.

A notary public having made and delivered a defective certificate of acknowledgment of a deed cannot amend it in the absence of the grantor.*

EJECTMENT'. The opinion states the point.

Hamlin & Son and W. B. Chapman, for plaintiff in error.

O. A. Hotchkiss and N. B. Smiley, for defendants in error.

PER CURIAM. This attempt to impart life to a void instrument has the merit of novelty. When Mrs. Sheedy affixed her name to the written instrument and acknowledged it, the acknowledgment was confessedly so defective as not to bind her or pass her title to the land. It was then delivered, and eleven days thereafter recorded. More than five months after the acknowledgment was actually taken, and the certificate thereof signed by the notary public indorsed thereon, he wrote and signed a second certificate of acknowledgment. The parties to the instrument did not again come before him, but he certifies what occurred months before. To this last certificate he adds facts not contained in his former certificate, with a view and for the purpose of making valid the writing of a married woman, which was then invalid. Effect cannot be given to this latter action to the notary public.

Judgment affirmed.

* See *Merritt v. Yates* (71 Ill. 636), 22 Am. Rep. 128.

Johnson v. Hulings.

JOHNSON v. HULINGS.

(108 Penn. St. 493.)

Contract — public policy — unlicensed broker.

An unlicensed real estate agent, subject to penalty for doing business without a license, cannot recover compensation under contract for such business.

ASSUMPSIT. The opinion shows the facts. The defendant had judgment below.

N. D. Smiley and M. F. Elliott, for plaintiff in error.

W. B. Chapman and John B. Chapman, for defendant in error.

GORDON, J. In this case, by a special verdict, the jury found that the plaintiff was, in the year 1878, the year of the transaction involved in this controversy, and also for some years before and after that period, engaged in the business of buying and selling real estate for others upon commission. That in that year he had no license or commission as a real estate broker, and that it was during this time that he negotiated a sale of real estate to H. L. Taylor and company for the defendant for which he was to receive \$10,000. On looking over the evidence we find that this verdict was founded upon the testimony of the plaintiff himself. In answer to the question, "What is your business?" he answered, "I am buying and selling oil lands for other parties, and real estate." He also said he had been engaged in that business about eight years. He further, in answer to a question put on the part of the defense, admitted that he had not taken out license for the year 1878. There is therefore no doubt but that the plaintiff was engaged in the purchase and sale of real estate as a business, and so came within the definition of "real estate broker," as found in the case of *Chadwick v. Collins*, 26 Penn. St. 138. Such being the case, the plaintiff was, by virtue of the eighteenth section of the act of the 10th of April, 1849, brought within the provisions of the act of May 27, 1841, and was subject to the penalty therein prescribed in case of a violation of those provisions. The result follows that Johnson, in the transaction in hand, stands in the position of a real estate broker who seeks to enforce a contract

* See *McConnell v. Kitchens* (20 S. C. 490), 47 Am. Rep. 845.

which, under the statute, he had no right to make, and by the making of which he subjected himself to the penalty imposed by that statute. But a contract such as this, opposed as it is alike to good morals and public policy, cannot be enforced. That has been ruled times without number. The case is almost identical with that of *Holt v. Green*, 73 Penn. St. 198; s. c., 13 Am. Rep. 737. That like this, was an action by a broker to recover his commissions, and there, as here, it appeared on cross-examination that he had no license. The only difference between the two cases is, that in the one cited the demand was for commissions *quantum meruit*, and in the case in hand it is on a special contract. This however may be regarded as a distinction without a difference, for we suppose no one will contend that the statute may be avoided by the introduction of a special contract for commissions. The statute deals not with the question of compensation, for that is left to the agreement of the parties interested, but with the business itself. "No individual or copartnership, other than those duly commissioned under the provisions of this act, shall use or exercise the business or occupation of a stock broker, or an exchange broker or a bill broker, under a penalty of \$500 for each and every offense, to be recovered as debts are by law recoverable, one-half for the use of the Commonwealth and the other half for the use of the guardians of the poor, in the city or county where such offense shall have been committed.

If then the business itself be unlawful, the commissions or gains arising from it without regard to the form of the contract for their payment are also unlawful.

But the plaintiff's main contention is, that as the transaction took the shape of a special contract, and as under his narr. and proof, he might have recovered without a revelation of the illegal character of that contract, therefore, and notwithstanding its true nature was revealed by cross-examination, he was entitled to recover. It might be enough to answer that in this he is met in the teeth by the case above cited. It was not necessary to the plaintiff's recovery in that case, that he should have proved that he had license, for that might have been presumed, but the fact that he had not license appeared on cross-examination, hence he lost his case. Nor does *Shepler v. Scott*, 85 Penn. St. 329, sustain the point made by the plaintiff, for there not only was the action on a special contract, but it nowhere appeared that the plaintiff was a broker, or that he

Johnson v. Hulings.

had not been licensed. Again the rule laid down in *Swan v. Scott*, 11 S. & R. 155, is cited as conclusive of this case. It was there said, as has been said in many succeeding cases, that the test whether a demand connected with an illegal transaction can be enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. About this rule there is no special obscurity, and if there were any such obscurity, it may be readily made clear by an examination of the case itself. The plaintiff, Scott, obtained an award of arbitrators against Swan, founded on an illegal lottery transaction, from which Swan appealed. He afterward withdrew the appeal, and on the same day executed to Scott his bond for the amount of the award, and thereupon Scott entered satisfaction of record. Then, in a suit brought upon the bond it was held, that the defendant could not go beyond that obligation to show that the foundation of the preceding award was an illegal transaction. The argument of Mr. Justice DUNCAN on this point is unanswerable. "If," says the learned justice, "Swan had acquiesced in this award for twenty days, the judgment would have been final; but the judgment remained notwithstanding the appeal, and when it was withdrawn Scott might have issued his execution; the judgment became final, and I may add, irreversible; it fixed both parties; there was an end of the controversy." The consideration of the bond was the award, which had, by the agreement of the parties, passed into a judgment, and that judgment could not be attacked collaterally, hence there was no way by which the original transaction could be reached. But how does all this fit the case in hand? Johnson has no intervening judgment behind which to shelter his illegal claim; he has not so much as a bond or note; he stands upon the illegal contract alone, and asks us to say that because in his narr. and case in chief he has had the ingenuity to avoid an exposition of its illegality, that illegality cannot be shown by way of defense. We have but to say, that if such is his reading of the rule of *Swan v. Scott*, he is badly mistaken in the legal principle thereby announced. Moreover if his interpretation of the rule be correct, then has this court departed from it in many recent cases; as in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 174; s. c., 8 Am. Rep. 159; *Kilborn v. Field*, 78 Penn. St. 194; *Thorne v. Insurance Co.*, 80 id. 15; *Holt v. Green*, *supra*; *Ham v. Smith*, 87 Penn. St. 63. And if these cases were wanting of support they might readily be duplicated from the reports of the

Johnson v. Hulings.

Supreme Federal Court. From these however we select but two cases, and that because of the manner in which they elucidate the doctrine under discussion. *Craig v. State*, 4 Pet. 410, was an action of assumpsit on a promissory note, and neither party having required a jury, the case was submitted to the court, which on hearing the evidence found that the defendants did assume as the plaintiff had declared, and that the consideration for the note and the assumpsit was for loan office certificates loaned by the State of Missouri at her loan office in Chariton. Under this finding by the court below, it was held in the Supreme Court, that under the plea of non-assumpsit the defendants were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. Now it will be observed, from the statement of this case, that the right of the defendant to attack the note through the illegality of the original contract on which it was based, was made to depend, not on what the plaintiff might happen to show, but upon the character of the pleadings. In other words, the defendant might raise the question of the validity of the contract as he might raise any other defense. In discussing this point, Chief Justice MARSHALL says: "Neither can it be doubted that the plea of non-assumpsit allowed the defendants to draw into question at the trial the validity of the consideration on which the note was given. Every thing which disaffirms the contract, every thing which shows it to be void, may be given in evidence on the general issue in an action of assumpsit; the defendants therefore were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated."

It will here be seen that the doctrine thus stated goes one step beyond what is required to sustain the ruling of the court below in the case in hand, for the defense was permitted to pass over the note and attack the contract in which it originated. Here however all that has been done has been to show the unlawful character of the very transaction on which the suit is founded. Again we have in *Armstrong v. Toler*, 11 Wheat. 258, a statement by the same eminent authority of the rule of law governing illegal and immoral contracts, which is correctly abbreviated in the syllabus of that case as follows: "Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice

Johnson v. Hulings.

will not lend its aid to enforce it. So if the contract be in part only connected with the illegal consideration, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it." Where however the promise or undertaking on which suit is brought is not connected with the illegal contract, the rule is different. As in the case put by Lord MANSFIELD in *Faikney v. Reynous*, 4 Burr. 2069, if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, and though the person who paid the money knew that it was paid in discharge of a debt not recoverable at law. All these cases tend to elucidate the rule as stated in *Swan v. Scott*, and determine beyond controversy that whenever it is made to appear during the trial of a case that the plaintiff's claim rests upon an illegal foundation, the court will not lend its aid to enforce it. On the other hand, where the illegal transaction is not involved in the case trying, but in a matter distinct and collateral, a recovery may be had.

We are therefore brought to the conclusion that the court below committed no error in directing judgment to be entered on the special verdict for the defendant.

The judgment is affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
IOWA.

SALE V. FIRST REGULAR BAPTIST CHURCH OF MASON CITY.

(63 Iowa, 26.)

Religious society — expulsion from church.

A religious society cannot be compelled to reinstate a member expelled from the church, where the expulsion was not by an act of the corporation and did not affect any interest in property.*

MANDAMUS to reinstate a member expelled from a church.
The plaintiff had judgment below.

Glass & Hughes and Miller & Cliggett, for appellant.

Blythe and Markley, for appellee.

SEEVERS, J. When rights of property are in controversy, it is conceded by counsel for the appellant that the courts have the jurisdiction and power to inquire as to the proceedings of an ecclesiastical body which affect such right. And on the other hand, as we understand, counsel for the appellee concede, that if there was

*To same effect, *Hardin v. Trustees, etc.* (51 Mich. 187), 47 Am. Rep. 555. See *Landis v. Campbell, post.*

Sale v. First Regular Baptist Church of Mason City.

no corporation, the courts could not inquire and determine whether the plaintiff had been lawfully expelled from the church for unchristian conduct, or for non-compliance with the rules and discipline of the church. But the appellee insists, that as a member of the corporation, the plaintiff was possessed of certain rights, for the protection of which she may appeal to the courts. This we understand to be the single question to be determined. The demurrer admits all the allegations of the petition which are well pleaded, and no more. The petition states that the corporation expelled the plaintiff, but this is a conclusion from the facts pleaded, and we have to inquire whether the allegation is true, and if so, whether the plaintiff has been deprived of a valuable right. The corporation and church, in so far as the discipline of the latter is concerned, are not identical. The object of the corporation is declared to be "purely religious, and the building up of a church membership." To that end it has charge of all the interests and property which is now owned or may hereafter be owned, by the "First Regular Baptist Church of Mason City, Iowa." It also has power to acquire property, and sue and be sued, and all powers enjoyed by "corporations organized for religious purposes under the existing laws of Iowa." The officers of the corporation consist of five trustees, clerk and treasurer. The trustees have the care of the property, both real and personal, and manage the affairs of the corporation. New members shall be admitted to membership, and other members released therefrom, according to the rules governing the Regular Baptist denomination of the United States. Certain "rules of church government in the matter of the discipline of members" are made a part of the petition, but it does not appear that such rules have been adopted by, or can be regarded as by-laws or rules governing the corporation. The only and primary object of the corporation is the acquisition and taking care of property. The rules of the church as to the discipline of members have no relation to the corporate property or corporate matters. Now it is quite clear that the plaintiff was expelled or cut off by the church for "insufferable offenses" against the church. The "hand of fellowship was withdrawn," not by the corporation, but by the church. The plaintiff sought to be restored to the church, and the church voted to indefinitely postpone the application." The corporation is not managed by the church, but by trustees. The latter have taken no action in relation to the plaintiff,

Haughey v. Hart.

nor has she been expelled therefrom by any action of the corporation, unless what was done by the church amounts to expulsion from the corporation. It will be conceded that all members of the church have the right to vote for and select the trustees of the corporation, and it will be conceded that the plaintiff has been deprived of this right by ceasing to be a member of the church. For some alleged offense against the church, the plaintiff has been expelled therefrom by the church. This is a purely ecclesiastical question into which we cannot inquire. By virtue of her church membership, the plaintiff became a member of the corporation, entitled only to the rights and privileges of a member of a corporation organized for religious or ecclesiastic purposes. The corporation was not organized for pecuniary profit. No such profit can possibly accrue to any member. No property interest, or any other valuable civil right, has been affected by the action of the church. The plaintiff has not and cannot suffer any civil damages whatever. This view is in harmony with *Hardin v. Baptist Church*, 51 Mich. 137 ; s. c., 47 Am. Rep. 555, where numerous authorities are cited. See also the later case of *Livingston v. Trinity Church*, 16 Vroom, 230. We are of the opinion that the court erred in overruling the demurrer.

Judgment reversed.

HAUGHEY V. HART.

(68 Iowa, 98.)

Negligence — pit near highway — animals running at large.

In a county where stock lawfully ran at large, the defendant dug a well on his uninclosed land, near the highway, and left it uncovered and unfenced, and the plaintiff's horse running at large fell into it and was killed. *Held*, that defendant was liable.

ACTION for negligent killing of a horse. The opinion states the facts. The defendant had judgment below.

Snelling & Irwin, for appellant.

Gregory & Bailie, for appellee.

Haughey v. Hart.

ROTHROCK, J. The following is a copy of the petition to which the demurrer was sustained :

“That the defendant was for the six months last past and is now the owner of the following described premises, to-wit : The north half of the north-east quarter of section 29, Grant township, Buena Vista county, Iowa ; and that said premises were in the month of January, 1883, and still are unfenced.

“That defendant caused and permitted to be dug on said unfenced premises a certain dangerous excavation or well, which was and is immediately adjacent to the highway, and knowingly and negligently permitted the same to remain wholly uncovered and unguarded, although she well knew and had been advised that said dangerous excavation was frequented by stock that was running at large. Yet notwithstanding these facts, she still permitted said dangerous and unsafe excavation to be and remain in the same unsafe condition, and removed from said premises, leaving no one in charge thereof and taking no precaution whatever to prevent stock from falling into said excavation or well.

“The plaintiff further states that the police regulation, restraining stock from running at large, is not now and never has been in force, as by statute provided, in the county of Buena Vista, Iowa.

“That in and during the month of January, 1883, a certain cream-colored horse belonging to the plaintiff, without any negligence on his part, strayed onto the premises of this defendant and fell into said dangerous well or excavation and was thereby killed, without any fault or negligence on the part of this plaintiff.”

The demurrer is based upon several grounds, two of which only need be mentioned. It is claimed in one of these grounds “that there are no facts showing that the negligence of defendant caused the death of the horse.” The other is that “said petition does not show that said horse was lawfully on defendant’s premises at the time of the injury complained of.”

The facts upon which the alleged negligence is based, briefly stated, are that the land of the defendant is unfenced and that upon the land, and immediately adjacent to a highway, she made a dangerous excavation and negligently allowed the same to remain uncovered, although she well knew that the place where said excavation was situated was frequented by stock running at large. Was this negligence for which plaintiff was liable ? We think the liability depends upon the fact whether or not the plaintiff’s horse

was rightfully running at large upon defendant's premises. It is claimed that as the county of Buena Vista has not restrained stock from running at large, the horse was rightfully at the place where he was killed. It was long ago held in this State that the owner of cattle running at large upon the land of another was not liable in trespass. In other words, it was held that cattle were free commoners and that the mere fact of permitting cattle to run at large is not a ground of imputing negligence to the owner. *Wagner v. Bissell*, 3 Iowa, 396 ; *Heath v. Coltenback*, 5 id. 490 ; *Alger v. Miss. & Missouri Ry. Co.*, 10 id. 268. And this is the law of this State at the present time, excepting in those counties where stock is restrained from running at large. What the rights of owners of stock in such counties are we need not determine.

The plaintiff was not chargeable with negligence in allowing his horse to run at large upon the uninclosed land of another. At least this must be so, unless it should appear that he was injuring the crops of the plaintiff at or near the uncovered well. Whether or not this would, under the law, change the rule above announced we need not determine in this case.

In the case of *Young v. Harvey*, 16 Ind. 314, the defendant commenced digging a well on an uninclosed lot owned by him in a suburb of Indianapolis. After sinking the well to the depth of six feet, he abandoned it and left it uncovered. The hole or pit was useless. The horse of plaintiff, while lawfully grazing on the common, fell into the well and was killed. It was held that an action for damages could be maintained by the owner of the horse. The opinion in that case appears to be based upon the thought, that owing to the large number of animals which were allowed to graze upon the premises, there was a strong probability of injury and damages arising from the unprotected excavation.

In *Shearman & Redfield Negligence*, 599, it is said : "Of course, it is culpable negligence to leave a pit or other excavation in such an unguarded state as to cause injury to a person having a right to be upon the land, and using that right with ordinary care." In *Addison on Torts*, 201, it is said: "Every occupier of land, who allows wells or mining shafts to remain on his land unguarded and unprotected, is responsible in damages to all persons falling into them, provided they were lawfully traversing the land on which the shaft or well existed, and fell into it without any negligence or misconduct on their part; but if they were at the time

Quinn v. Shields.

trespassers on the land, and the well or shaft was more than twenty-five yards from a public carriage way, they will not be entitled to recover." The reference to the rights of the parties within twenty-five yards from a public carriage way is made, because of the provisions of the General Highway Act in England.

It appears from these authorities that the rights of the parties are made to turn upon whether or not the injured person or animal was, at the time of receiving the injury, rightfully upon the defendant's premises. And in the case of *Young v. Harvey, supra*, stress is laid upon the fact that there was a strong probability of injury by reason of the large number of animals grazing upon the common. We think, that if the owner of unimproved and unbroken land should make an excavation thereon at a place remote from where stock is accustomed to roam, and leave the excavation uncovered, he should not be held liable for injuries to animals falling into it. But it is averred in the petition that the excavation was immediately adjacent to a highway, and in a place which the defendant knew was frequented by stock running at large. In such case, we think the omission to cover or protect the excavation was negligence. The question of negligence, or freedom from negligence, should be determined by the other question, whether or not a person exercising reasonable care and prudence would apprehend that there was a probability of injury to persons or animals by reason of the excavation. We think the demurrer should have been overruled.

Judgment reversed.

QUINN V. SHIELDS.

(82 Iowa, 129.)

Will — charitable devise.

A devise to one for life, providing that what remains at his death he shall devise "to the support and management of such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith" as he may determine, is valid.*

* *Contra, Prichard v. Thompson* (95 N. Y. 70), 47 Am. Rep. 9.

ACTION to construe a will. The opinion states the case.

Stiles & Beaman, for appellants.

H. B. Hendershott and McNett & Tisdale, for appellees.

BECK, J. I. Mary Tally, deceased, executed a will, in the sixth item of which she directs that a certain note and mortgage securing it, made to her by The Sisters of the Humility of Mary, a corporation organized under the laws of the State, should be surrendered to that corporation, and should be canceled without payment. The seventh item of the will disposes of certain notes and mortgages by directing, in the language of the will, that the securities "shall go and be held and controlled and managed by my friend and relative, Miss Mary T. Shields, for and during her natural life, and for her and to her sole benefit, and at the death of Mary T. Shields, I desire, and my will is, that the principal of the securities in this subdivision of my will mentioned, and so much of the interest arising therefrom as shall remain in the hands of Mary T. Shields unexpended, shall go to the support and encouragement of such worthy and charitable and educational and religious institutions of the Roman Catholic faith, as my said friend, Mary T. Shields, may determine, and she is charged with the duty of making such disposition of said means as is herein provided, by will properly executed before her death, it being my intention that so much of the funds herein intrusted to said Mary T. Shields, for her use and benefit during her natural life, as may remain at her death, shall not descend to her heirs, but go, as above provided, to some Catholic institution or institutions."

The ninth item directs that Mary T. Shields "shall take and hold, for the purposes mentioned in the seventh subdivision [item] of this will," certain real estate, "or the proceeds which may arise from the sale of said property."

[Omitting immaterial statements.]

It is alleged in the petition that the bequest in the seventh item, and the devise in the ninth, are void for uncertainty, inasmuch as the will does not indicate the persons or objects for which the funds and property shall be appropriated.

The defendants, the executors named in the will (Mary T. Shields being one of them), which has been admitted to probate, and the

Quinn v. Shields.

legatee and devisee named in the sixth, seventh and ninth items of the will as above shown, demurred to the petition, on the ground that it fails to show facts entitling plaintiff to the relief claimed. The demurrer was sustained. The case is before us for determination upon the pleadings.

[Minor matters omitted.]

We come now to the consideration of the bequest and devise found in the seventh and ninth items of the will. They need not be separately referred to in our discussion of the principles of law, the same doctrines applying to both.

It plainly appears that in these items a life estate in the real property, and the income arising from the personalty during the life of Mary T. Shields, are willed to her. This is not denied by either party. The only question in dispute is this: Does the will so dispose of the estate in remainder in the realty, and the funds that shall be found upon the death of the devisee and legatee, that the court will enforce its provisions? Counsel for plaintiffs insist that these items of the will are void for uncertainty. This statement discloses the question for our decision in this branch of the case.

It is first insisted by plaintiffs' counsel that the objects and charities mentioned in the will, to which the real estate and funds are to be appropriated, are so uncertain that the law will not and cannot effectuate the intentions of the testator, and enforce the will. The foundation of this position is that the will does not, with sufficient certainty, indicate the beneficiaries of the charity.

Reading the items of the will in question, we discover the testament in the following language: "I desire, and my will is, that the principal of the securities in this subdivision of my will mentioned, and so much of the interest arising therefrom as may remain in the hands of said Mary T. Shields, unexpended, shall go to the support and encouragement of such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith, as my said friend, Mary T. Shields, may determine." The beneficiaries of the charity of the testator are here clearly indicated to be "such worthy and meritorious" institutions of the "Roman Catholic faith," as may be determined by Mary T. Shields. The will does not specifically name the persons or institutions that are to receive the charity. It leaves the beneficiaries to be chosen and named by the person appointed to distribute the charity. It is competent for a testator to bestow a charity upon a person or in-

stitution to be chosen or named by a trustee or executor. In that case, there is no uncertainty of the beneficiary, for the courts, when called upon to enforce the testament, will be advised of the direction of the charity by the act or declaration of the trustee or executor. Wills providing for the distribution and appropriation of charities in this manner are always upheld by the courts. *Perry Trusts*, § 731 ; 2 Redf. Wills (2d. ed.), 530–535 ; *Hesketh v. Murphy*, 35 N. J. Eq. 23 ; and see cases cited in note by reporter ; *Wells v. Doane*, 3 Gray, 201 ; *Brown v. Kelsey*, 2 Cush. 243 ; *Saltonstall v. Sanders*, 11 Allen, 446 ; *First Universalist Society of North Adams v. Fitch*, 8 Gray, 421 ; *Going v. Emery*, 16 Pick. 107 ; *Miller v. Teachout*, 24 Ohio St. 525 ; *Am. Tract Soc. v. Atwater*, 30 id. 77 ; *DeBruler v. Ferguson*, 54 Ind. 549 ; *Com. of La-grange Co. v. Rogers*, 55 id. 297 ; *Pickering v. Shotwell*, 10 Penn. St. 23 ; *Witman v. Lex*, 17 S. & R. 88 ; *Beaver v. Filson*, 8 Penn. St. 327 ; *Perin v. Carey*, 24 How. 465 ; *Loring v. Marsh*, 6 Wall. 337.

An elaborate note to *Hesketh v. Murphy*, *supra*, by the reporter and another, found in 21 Am. Law Register (N. S.), 660–666, cite scores of cases holding that similar dispositions of charities by will are valid. It also gives quite a number that may be cited against the doctrine. We doubt not however that the conclusion we reach is supported by the great weight of authority. The facts of this case distinguish it from *LePage v. McNamara*, 5 Iowa, 124.

We reach the conclusion that the will is not void for uncertainty of the beneficiaries of the charity.

We are to inquire whether there is a trustee named in the will, whose act or designation will render certain the beneficiaries of the charity. This may be admitted, for the purposes of the case, without so deciding, to be necessary. Counsel for plaintiffs insist that the will provides for no such trustee. We think the contrary clearly appears, and that the instrument in the plainest terms names Mary T. Shields as such trustee. The language of the will following that last quoted is as follows : “ She [Mary T. Shields] is charged with the duty of making such disposition of said means as is herein provided, by will properly executed before her death, it being my intention that so much of the funds herein intrusted to said Mary T. Shields for her use and benefit during her natural life, as may remain at her death, shall not descend to her heirs, but go as above provided, to some Catholic institution or institutions.”

Quinn v. Shields.

It cannot be doubted that if the words "by will properly executed before her death" had been omitted, the language would have clearly indicated the creation of a trust, and directed its execution. But counsel for plaintiff urge, that as these words limit the power of Mary T. Shields to make the appropriation of the charity and designation of the beneficiaries by will, she cannot therefore be regarded as a trustee. There is no force in this position for these reasons: Suppose Mary T. Shields should waive her life estate and interest in the property, can it be doubted that she could then indicate the beneficiaries to receive the charity? Or can it be doubted that she has the right and power to surrender her life estate? In case she should do so, the trust could be executed by her in her lifetime. Can it be said that she will not do so? Surely chancery will entertain no such presumption.

But we are able to discover no reason why the trust may not be executed by a will, as permitted or contemplated by the language of the testament before us. Indeed the provision seems to have been suggested by common sense, seeking to effectuate the intention of the decedent. She intended that Mary T. Shields should enjoy the property during her life, and she further intended that the same power should direct the charity to the beneficiaries who should finally receive it. When Shields' rights shall cease she will be no more in life, and will therefore be incapable of then naming the beneficiaries. But property may be disposed of by will, and the decedent, in the exercise of good common sense, chose that character of disposition on the part of Shields which would perfectly carry out the intention of the testator. We know of no legal principles which will defeat the will on this ground, and have been referred to no authorities so holding. The authorities hold, we think, that a power relating to a trust may be executed by a will where the power creating the trust so provides. See 4 Kent Com. *330; 2 Hillard Real Prop., p. 563, § 41; 2 Greenl. Cruise Real Prop., p. 534, § 16; 1 Jarm. Wills, 547; 1 Story Eq. Jur., § 173, and notes. These authorities go to the extent of holding, that when no form for the execution of the power is prescribed it may be executed either by deed or will.

It is urged that Shields may not execute a will, and in that case the court cannot enforce the will for the reason of the uncertainty that will exist as to the beneficiaries of the charity. We cannot presume that the trustee will neglect to discharge the duty imposed

State v. Shoemaker.

upon her of naming by will the beneficiaries, but on the contrary must presume that she will, in the discharge of her duty, indicate by testament the objects to which the charity shall be appropriated. But at all events that question cannot now be anticipated. It will be time enough to meet it when Shields dies without making the disposition of the property by will, if such a thing should happen.

The foregoing discussion disposes of all questions necessary to be considered in the disposition of this case, and brings us to the conclusion that the judgment of the District Court ought to be
Affirmed.

STATE V. SHOEMAKER.

(62 Iowa, 242.)

Bastardy — liability for support.

A man marrying a woman, known by him to be pregnant by another, is alone liable for the support of the child.

PROCEEDING to charge defendant with support of a bastard. The opinion states the case. The defendant had judgment below.

H. B. Hendershott, Samuel Jones and Smith McPherson, attorney-general, for State.

Stiles & Beaman, for appellee.

BECK, J. The undisputed testimony as disclosed by the evidence for the State established the following facts:

1. The child was begotten by the defendant, and was born on the 18th day of August, 1882. 2. Prior to its birth, on the 1st day of June, 1882, the mother, the prosecutrix, married another man named Getz. 3. At and before the marriage, Getz was informed by the prosecutrix that she was *enceinte*; her condition was apparent from her appearance. Upon these facts, the District Court held that plaintiff could not recover, and directed the jury to return a verdict for defendant.

Under chapter 56, title 25 of the Code, a father may be charged

State v. Shoemaker.

with the maintenance of his illegitimate child. The proceeding thereunder is entitled as an action in the name of the State against the alleged father, and may be prosecuted upon the complaint of the mother. It is a civil action of a summary nature, *Holmes v. State*, 2 G. Greene, 501; *Black Hawk County v. Cotter*, 32 Iowa, 125, and is intended to secure the maintenance of the bastard, to the end that in no event shall the public become chargeable therewith. Of course, if one stands in the relation to the child which will cause the law to esteem him liable as its father for its support, being in *loco parentis*, the proceeding cannot be prosecuted against another who is in fact the natural father. The one whose relations are such that he stands in *loco parentis* the law esteems the father, and will not, for various reasons, inquire by whom the child was begotten. One who marries a woman known by him to be *enceinte* is regarded by the law as adopting into his family the child at its birth. He could not expect that the mother upon its birth would discard the child and refuse to give it nurture and maintenance. The law would forbid a thing so unnatural. The child, receiving its support from the mother, must of necessity become one of her family, which is equally the family of the husband. The child then is received into the family of the husband, who stands as to it in *loco parentis*. This being the law, it enters into the marriage contract between the mother and the husband. When this relation is established, the law raises a conclusive presumption that the husband is the father of his wife's illegitimate child. We must not be understood to hold that this rule prevails in cases involving questions of heirship and inheritance. In these cases the rights of others besides the husband and bastard arise. In this case, the rights and liabilities of the husband and child are alone involved, they rest upon the relations which impose upon the husband the duty of maintaining the child. Our conclusion is supported by public policy, and considerations which work for the peace and well being of families. A husband who, in the manner we have indicated, has put himself in *loco parentis* of a bastard child of his wife, ought not to be permitted to disturb the family relation, and bring scandal upon his wife and her child, by establishing its bastardy, after he has condoned the wife's offense by taking her in marriage.

The conclusion we reached in this case is supported by *State v. Romaine*, 58 Iowa, 46, and cases therein cited.

 Thomas v. Stetson.

Many of the cases cited by defendant's counsel, *Wright v. Hicks*, 15 Ga. 160; *Cross v. Cross*, 3 Paige, 139; 23 Am. Dec. 778; *Goodright v. Saul*, 4 Tenn. 356; *Lomex v. Holmden*, 2 Str. 940; *Hall v. Commonwealth*, Hardin (Ky.), 486; *State v. Pettaway*, 3 Hawks, 623; *Commonwealth v. Wentz*, 1 Ashm. 269; *The King v. Inhabitants of Kea, East*, 132; *The King v. Inhabitants of Maidstone*, 12 id., 550; *Shelly v. ———*, 13 Ves. 56; *State v. Broadway*, 69 N. C. 411; *Stegall v. Stegall's Adm'r*, 2 Brock. C. C., 256, involve questions of heirship or inheritance, and in this respect differ from the case before us. The distinctions between those cases and this, based upon this ground, are obvious. We have above pointed them out. Other cases cited by counsel are also distinguished by these facts from this case. It is our conclusion that the judgment of the District Court ought to be

Affirmed.

THOMAS V. STETSON.

(62 Iowa, 537.)

Partnership — paying individual debt with firm property.

One partner, individually indebted to a person owing the firm, may not apply the debt due the firm to the payment of his own debt, without consent or ratification by his copartners, and the debtor to the firm is still liable therefor.*

ACTION for goods sold and delivered. The opinion states the case. The plaintiff had judgment below.

Gregory & Bailie, for appellant.

Lot Thomas, for himself.

ADAMS, J. The facts as shown by the answer are that the goods in question were purchased by the defendant of one J. F. Doty & Co., the plaintiff's assignor; that this firm consisted of J. F. Doty and James R. Day, and was engaged in selling lumber and coal at Storm Lake; that Doty resided at Storm Lake and was the active

* To same effect, *Cotzhausen v. Judd* (43 Wis. 218), 28 Am. Rep. 589.

Thomas v. Stetson.

member of the firm and had the entire and exclusive management and control of the business ; that Day resided in Dubuque ; that the sale by J. F. Doty & Co. to the defendant of the goods in question was made through Doty as a member of the firm ; that the defendant was a merchant at Storm Lake, engaged in a different line of trade, and sold goods in his line on credit to Doty for his individual use, and afterward Doty and the defendant made a settlement whereby it was agreed that the indebtedness due to J. F. Doty & Co. from the defendant should be deemed paid by the release of the indebtedness due from J. F. Doty individually to the defendant. This alleged settlement constitutes the payment upon which the defendant relies. For the purpose of showing that J. F. Doty had authority to accept in payment of indebtedness due his firm the release of certain indebtedness due individually from himself, the defendants made certain averments, which are in substance that for two years or more he had bought goods on credit of J. F. Doty & Co., and had sold goods on credit to J. F. Doty for his individual use, and that he and Doty had afterward applied one account against the other, and J. F. Doty had charged himself accordingly on the firm books of J. F. Doty & Co., and that Day did not object thereto. He further averred in substance that it was the uniform practice and usage of the firm of Doty & Co. at all times to receive accounts against Doty individually in payment of their partnership demands, which was well known throughout the community, so that this defendant knew such to be their uniform practice prior to the time that he dealt with the firm, and that in dealing with it and making settlements with Doty as set out he relied upon such practice.

These are in substance the averments upon which the defendant relies as showing payment, but in our opinion they do not have that effect. A partner has authority to bind the firm in all matters pertaining to the partnership business. But it is not properly partnership business to release indebtedness due to it in consideration of the release of indebtedness due to its debtor from one of its members. The precise question arose in *McNair v. Platt*, 46 Ill. 211. In that case the court said : "The rule is firmly established, and not to be controverted, that where a member of a co-partnership is indebted to a person owing the firm, he cannot apply the indebtedness due to the firm for the purpose of cancelling his indebtedness, nor can he apply the funds or property of the firm

for such purpose without the consent of his copartner, or at least his subsequent ratification." Citing *Brewster v. Mott*, 4 Scam. 378, and *Hilliard v. Walker*, 11 Ill. 644. See also 1 Dev. & Bat. Eq. 284; *Weed v. Richardson*, 2 Dev. & Bat. Law, 535; *Pierce v. Pass*, 1 Port. (Ala.) 232; *Caldwell v. Scott*, 54 N. H. 414; *Todd v. Lorah*, 75 Penn. St. 155; *Everingham v. Ensworth*, 7 Wend. 326; *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293; *Viles v. Bangs*, 36 Wis. 135. Possibly it may be thought that a different rule is held in *Stokes v. Stevens*, 40 Cal. 391. We are inclined to think that that case is distinguishable from the one at bar; but whether it is so or not, we have to say that it appears to us that the ruling of the court below is sustained by a great preponderance of authority. It may be that if the release of the firm account against the defendant, for a consideration moving to Doty, was previously authorized or subsequently assented to by Day, the other member of the firm, the transaction should be deemed to be that of the firm, and valid, if made in good faith, even as against its creditors. The defendant insists that he pleaded such authorization. But it appears to us that what he relies upon as averments of authorization are at most only averments of facts proper to be proven as evidence tending to show authorization. He avers that previously settlements of a similar kind had been made between him and Doty, and entered upon the firm books, and that Day did not object. But this would not be even a circumstance against the defendant, unless Day knew what the books contained, or otherwise had knowledge of what had been done. The defendant further avers that it was the uniform practice of the firm to receive accounts against Doty in payment of accounts due the firm, which fact was known to the defendant and relied upon by him when he sold on credit to Doty. But this averment by the defendant must be taken in connection with another, and that is, that Doty "had the entire and exclusive management and control of the business of the firm." The firm then did no business except what Doty did, and had no practice except what grew out of Doty's acts. Besides, the "practice" upon which he says he relied would, as already said, if it had been the practice of the firm, only be a circumstance to be shown in evidence for what it was worth. The defendant should have expressly averred authorization, if he relied upon any authorization as distinct from that implied from the fact of partnership.

He insists that it is a great hardship if his settlement with Doty

Thomas v. Stetson.

cannot be sustained. But he knew, or should have known, that his transaction with Doty was not within the scope of the firm business, and unless sanctioned by Day, was a misappropriation by Doty of firm assets. When a person enters into such a transaction with a member of a copartnership, it appears to us that we are justified in saying that it is his duty to see whether or not what appears to be a wrong on its face is so in fact. We think that the demurrer to the defendant's answer was properly sustained.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

ROGERS V. COX.

(96 Ind. 157.)

License — to remove building.

The oral sale of a frame building with the right of removal authorizes the purchaser to enter on the land to remove it, and such license is irrevocable.*

TRESPASS. The opinion states the facts. The defendant had judgment below.

R. Warner, D. W. Chambers and J. S. Hedges, for appellant.

J. M. Brown, for appellee.

ELLIOTT, C. J. The complaint of the appellant alleges that he is the owner of the land therein described, and that the appellee wrongfully entered upon it, and without right removed a large frame building.

The second paragraph of the answer alleges that the appellee bought the building of the appellant and entered on the land for the purpose of removing the building which he had purchased. A

* To same effect, *Cent. Branch R. Co. v. Fritz* (20 Kana. 480), 27 Am. Rep. 175.

Rogers v. Cox.

written contract is set forth showing the sale of the building to the appellee.

We regard this answer as sufficient. The appellant, having sold to the appellee property of which possession could only be obtained by an entry upon the land, impliedly licensed the latter to enter, and take possession of the property he had purchased. An owner of land, who sells property which can only be taken possession of by an entry on the land, cannot deny the vendee's right to enter for that purpose. It would be a strange rule that would permit a man to sell property to another, and then prevent him from getting possession of it. The purchase of property, where the contract of sale is fully complied with by the vendee, vests in him a right which no subsequent act of the seller can take from him. The written contract set forth in this paragraph of the answer secured to the appellee a right to remove the building for which the appellant had accepted the stipulated price.

The third paragraph of the answer differs from the second in that it sets forth a verbal contract for the purchase of a building on the appellant's land, and avers that the latter had, as part of the contract, granted the appellee the right to remove the building. The answer is good because it justifies the alleged trespass by averring a parol license. It has been many times decided that a parol license is valid. There was an interest coupled with this parol license, which precluded the appellant from revoking it. *Buchanan v. Logansport, etc., Ry. Co.*, 71 Ind. 265, and cases cited. The rule upon this subject is this: where the license is coupled with an interest, it cannot be revoked, although a naked license may be. *Miller v. State*, 39 Ind. 267; *Snowden v. Wilas*, 19 id. 10; *Hodgson v. Jeffries*, 52 id. 334; *Nowlin v. Whipple*, 79 id. 481; *Kipp v. Coenen*, 55 Iowa, 63; *Lee v. McLeod*, 12 Nev. 280; *Long v. Buchanan*, 12 Md. 502.

The sale of a building with the right of removal is not necessarily the sale of an interest in land within the meaning of the statute of frauds. In *Foy v. Reddick*, 31 Ind. 414, replevin was held maintainable for a house. In *Griffin v. Ransdell*, 71 id. 440, it was said: "A dwelling-house, although situated on the real estate of another, may under some circumstances, be treated as personal property." It has been held by this court that an agreement made before the building is erected may make the structure personal property, and vest in the builder the right of removal.

Yater v. Mullen, 23 Ind. 562; *Yater v. Mullen*, 24 id. 277; *Pea v. Pea*, 35 id. 387; *Young v. Baxter*, 55 id. 188; *Price v. Malott*, 85 id. 266; *Taylor v. Watkins*, 62 id. 511. A recent author says: "But if such erection is in pursuance to a license granted by the owner of the soil, then the annexation will not make the building or other structure a part of the realty. A conveyance of the land will not transfer the structure with it, but will operate as a revocation of the license, and compel the owner, within a reasonable time after such revocation, to remove the structure or lose his right of property therein." Tiedeman Real. Prop., § 2. If a building may be made personal property by an agreement entered into previous to its erection, it is difficult to see why the same character may not be impressed on by a subsequent agreement making sale of it and granting a right of removal. If the building should be torn down by the owner and the materials sold, it is clear that the sale would be of personal property and not of an interest in land, and we can perceive no reason for holding that a standing building is real estate, but after it has been demolished the material of which it was composed becomes personal property. *Keyser v. School District*, 35 N. H. 477. The reasonable doctrine is, that where the effect of the contract between the parties is to impress upon the structure the character of personalty, it takes that character whether the contract was made before or after its erection, unless the structure is inseparably annexed to the land. Mr. Browne inclines to the view which we regard as the just one, for he writes: "Although the improvements put upon land, such as buildings and other erections, tillage and labor generally, may be so incorporated with the land itself as to be inseparable therefrom in fact, yet it would seem that they ought to be so far separately regarded as to be capable of a distinct purchase and sale by verbal contract." Browne Stat. of Frauds, § 233.

We are not to be understood as holding that the sale of a right or interest in a building may not be a sale of real estate. On the contrary, we have no doubt that where the house is to permanently remain on the land, then a sale of a right in it would be a sale of an interest in the land within the meaning of the statute of frauds, if made by the owner of the land, though it would perhaps be otherwise if made by a tenant or licensee. But where the owner sells a building with the right of removal, he severs it from the land, and gives it the character of personalty; and in impressing

Rogers v. Cox.

this character upon it, he takes it without the statute as effectually as if he had torn it down and sold the materials of which it was composed.

We need not decide what would be the rule in a case where it was made to appear that the structure was permanently annexed to the land. No such case is made by this record. The building is described in the complaint as a large frame building, and for aught that appears, may not have been permanently annexed to the freehold. The fair inference is that it was not so annexed, because it was sold as personalty, and a license granted to remove it. The clear implication therefore is, that it belonged to that class of buildings, as saw-mills and the like, which are easily susceptible of severance from the land on which they stand. It may be true that the word "house," in its ordinary legal meaning, signifies real property, but this meaning is by no means a fixed one. *Rogers v. Smith*, 4 Penn. St. 93; *Common Council v. State*, 5 Ind. 334; *Griffin v. Ransdell*, *supra*. But the complaint in this case does not show that the structure sold by the appellant was a house, or structure, of a permanent character. It may have been a frame building of the most temporary character, as a booth, a shed, or the like, and we think there can be no doubt that parties may treat a structure of such a character as personal property, whether the contract impressing that character upon it is made before or after its erection. The cases do indeed go much further, and lay down the rule in very broad and comprehensive terms. *State v. Bonham*, 18 Ind. 231; *Hinckley v. Baxter*, 18 Allen, 139; *Ham v. Kandall*, 111 Mass. 297; *Russell v. Richards*, 10 Me. 429; 25 Am. Dec. 254; *Tapley v. Smith*, 18 Me. 12; *Pullen v. Bell*, 40 id. 314; *Keyser v. School District*, *supra*; *Coleman v. Lewis*, 27 Penn. St. 291. But all we are required to decide, and all we do decide upon this branch of the case is, that where the building is not a permanent one and is not annexed to the freehold, and is sold with a right of removal, the contract, although verbal, will justify the purchaser, if he has fully complied with his contract, in entering and removing the building.

If there was any error in instruction No. 2 given by the court, it was in appellant's favor. A purchaser of a building, such as the evidence shows the one in controversy to be, has a right to remove it whether he was or was not in possession of the land at the time the purchase was made or the removal effected. It is a familiar

Standard Oil Company v. Combs.

elementary rule, that the grant of a principal thing carries with it all incidents, and under this rule the sale of a building standing on land necessarily implies a right to enter on the land and take the building. In *Sterling v. Warden*, 51 N. H. 217, it was said: "There are licenses which are irrevocable, though they relate to an entry upon and the occupation of land or real estate, and are by parol; as where for instance the license is directly connected with the title to personal property which the licensee acquires from the licensor at the time the license is given, whereby the license is coupled with an interest. Thus where one sells personal chattels on his own land, and before a reasonable time to remove them forbids the purchaser to enter and take them, it was held to be a license which he could not revoke within such reasonable time. *Nettleton v. Sikes*, 8 Metc. 34; *Wood v. Manley*, 11 Ad. & E. 34; *Parsons v. Camp*, 11 Conn. 525; *White v. Elwell*, 48 Me. 360; 1 Washb. Real Prop. 401." It is a principle recognized in various forms that a right to do a thing upon another's land invests, by necessary implication, the person to whom it is granted with authority to enter and use the land so far as is reasonably necessary to effectuate the principal right. *Harlow v. Marquette, etc., R. Co.*, 41 Mich. 336; *Arrington v. Larrabee*, 10 Oush. 512.

Judgment affirmed.

STANDARD OIL COMPANY v. COMBS.

(98 Ind. 179.)

Taxation — of chattels — ownership by non-resident.

Chattels purchased in one State by a citizen of another, and remaining in the former to receive a finishing process of manufacture, are taxable in the State where purchased.

THE opinion states the point.

R. S. Taylor and H. J. May, for appellant.

C. H. Mason, for appellee.

ELLIOTT, C. J. On the 20th day of March, 1880, the appellant contracted with J. A. McGregor for the purchase of 3,000,000

Standard Oil Company v. Combs.

staves, and on the 20th day of September following for 1,000,000 more. The contracts, as originally written, provided that McGregor should manufacture the staves and deliver them at the landing in Pittsburg, Pennsylvania, where they were to be inspected and paid for, but a modification of the contracts was subsequently made, by which it was agreed that McGregor should deliver to the appellant, at its stave yards in Perry county, Indiana, the staves contracted for, where they were to receive a finishing process called "bucking," and when "bucked" they were to be shipped to the appellant at Pittsburg. The original contracts provided that on inspection at Pittsburg the staves should be paid for at the rate of \$26 per 1,000, and the contracts as modified provided that when the staves were cut and piled up the appellant should advance on the purchase-price \$12 per thousand for the staves in the rough, and \$4 more when they were "bucked." The term "bucking" signifies that part of the process of manufacture in which the rough staves are put through a machine called a "bucker," and by which they are cut to a uniform thickness, the surface partially smoothed and a slight convexity of form produced. Under these contracts the staves were in the appellant's yards in Perry county on the 1st day of April, 1881, and taxes were assessed upon them.

The appellant's counsel thus state the question presented by the record : " Were the staves, of which the appellant had thus become the owner, and which happened to be in Perry county on the 1st day of April, 1881, subject to taxation in that county under the laws of Indiana? "

Property in the course of transit through this State, and here only for the purpose of transportation, is not subject to taxation. *Standard Oil Company v. Bachelor*, 89 Ind. 1 ; *State v. Carrigan*, 39 N. J. L. 35. If however the property is here for a different purpose, it may be subject to taxation by our laws, although its owner may reside in another State. There is a difference between property of a tangible nature and choses in action, for property of the former character is liable to assessments wherever it has a *situs*; while taxes on choses in action are, as a general rule, leviable against the owner under the laws of the State of his domicile. *Herron v. Keoran*, 59 Ind. 472 ; s. c., 26 Am. Rep. 87 ; *Burroughs Taxn.*, § 40 ; *Cooley Taxn.* 14 ; *Dyer v. Osborne*, 11 R. I. 321.

The property of the appellant was of a tangible nature, and

Standard Oil Company v. Combs.

was in this State for the purpose of undergoing, while here, a partial finishing process, and it cannot be regarded as having been in the course of transit nor as here for a mere temporary purpose. Property within the State for the purpose of undergoing any part of the process of manufacture is here for more than a temporary purpose connected with its transportation. The *situs* of the property does not depend upon the extent of the work that is to be done upon it, for if it is here to be put through any of the stages in the process of manufacture, it is here for a purpose which legitimately subjects it to taxation. It cannot be justly asserted that property within the State for the purpose of undergoing a part of the process of manufacture is here for a mere temporary purpose, or for the purpose of transportation. The conclusion we have stated seems clear upon principle but authorities are not wanting. In *Rieman v. Shepard*, 27 Ind. 288, the court said: "In the case under consideration the property was not in transit through the county of Vigo. It was brought there, not for immediate reshipment, but that money, labor and skill might be there expended upon it, to enhance its value and change its condition as a merchantable commodity. While there and undergoing this change in its condition, it, as property, had a *situs* within the State and was under the protection of its laws."

The case of *Powell v. City of Madison*, 21 Ind. 335, holds, as does the preceding case, that property while within this State for the purpose of undergoing a process to prepare it for market in an improved or changed form, is subject to taxation. Speaking of goods *in transitu*, the Supreme Court of Illinois says: "Goods or property are technically *in transitu* when they are passing from one place to another, which was not the case with this grain. It had not commenced its transit from one place to another;" and it was held that grain bought by an agent on commission was subject to taxation. *Walton v. Westwood*. 73 Ill. 125. In the case of *Ogilvie v. Crawford County*, 7 Fed. Rep. 745, the court held, as we did in *Standard Oil Co. v. Bachelor*, *supra*, that property ready for transportation should be regarded as *in transitu* and exempt from taxation, but said: "There must be in my judgment a purpose to ship immediately or at least as soon as transportation can be conveniently obtained, followed by actual shipment in a reasonable time in order to exempt the property from taxation."

The Supreme Court of California, in *People v. Niles*, 35 Cal.

Standard Oil Company v. Combs.

282, said that cattle brought into a county for pasturage were not there transiently, but were there for such a purpose as subjected them to taxation. A similar doctrine was declared in *Hardesty v. Fleming*, 57 Tex. 395.

There is, as is obvious from what we have said, a radical difference between this case and the case of *Standard Oil Co. v. Bachelor*, *supra*, for in that case nothing was to be done to the property in this State; it was ready for shipment and the owner intended to ship it as soon as means of transportation could be procured; while in the present case the property was not ready for shipment nor was it intended to be shipped until subjected to a process changing its form and enhancing its value. The question of intent is a material one, for great abuse would grow up if property might be accumulated without the intention to ship at once, or as soon as by reasonable diligence means of transportation could be obtained. The materiality of the intention to ship was noted in *Ogilvie v. Crawford County*, *supra*, where it was said: "This allegation of intention is essential, because otherwise a purchaser might crib his corn on a railway with no purpose of immediate shipment but for the purpose of awaiting the future course of the markets or with intent to evade taxation; in which cases the transit would, in my opinion, be treated as at an end, for the time being at least." The intention of the buyer in this case was to keep the property within this State for a definite purpose, and not to ship it until that purpose had been accomplished. While it was here awaiting the execution of that purpose it was within the protection of our laws, and must bear its share of the public burdens. Judge Story says: "A nation within whose territory any personal property is actually situate has an entire dominion over it while therein in point of sovereignty and jurisdiction, as it has over immovable property situate there." Story Confl. Laws, § 550. The authorities sustain this doctrine. *Ames Iron Works v. Warren*, 76 Ind. 512; s. c., 40 Am. Rep. 258; *Green v. Van Buskirk*, 7 Wall. 139; *Clark v. Tarbell*, 58 N. H. 88.

Property in this State for the purpose of being subjected to a process essential to its fitness for sale or use is situated here, no matter what may be its destination. All property in a mill or factory owned by non-residents is situated here while work or skill is being expended upon it, although the purpose for which it was bought was to prepare it for foreign markets. Cotton or wool in a New England mill or factory for the purpose of being manufactured into fabrics

Standard Oil Company v. Combs.

is situated there, wherever its owner may reside, or whatever he may intend to do with it after the manufacturing process is completed, and what is true in such a case is equally so in the present.

A statute subjecting to taxation property bought in this State, and kept here for the purpose of undergoing a partial process of manufacture, is not in conflict with that provision of the National Constitution which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States." Constitution U. S., art. 1, § 8. There is in such a case no interference with inter-State commerce; the State does no more than exercise an attribute of sovereignty over personal property within its dominion, and does not usurp any power belonging to Congress. If it be true that a State cannot tax property in such a case, then wheat sent here to be manufactured into flour in our mills cannot be taxed, although it is situate within our territory and is within the protection of our laws. This position of counsel is not supported by principle, nor is it in harmony with the adjudged cases. Judge Cooley says: "But a tax on property that may be the subject of commerce under congressional legislation is not a tax on commerce. Neither is a tax on property that has been the subject of such commerce, where it is taxed only as property, and in common with all other property within the State." Cooley Taxn. 62. Coal was brought from Pennsylvania to Louisiana for sale, taxes were assessed against it in the latter State, and it was held that the statute authorizing the tax did not violate the constitutional provision of which we are speaking. *Brown v. Houston*, 33 La. Ann. 843; s. c., 39 Am. Rep. 284.

The statute declares that taxes shall be levied upon property as property, and does not discriminate against any person, or any class of persons, and is valid under the decisions of the Supreme Court of the United States.

The principle established by the decisions of that court is, that the taxing power of the State may be exercised upon property within its territory, although commerce and its instruments may be indirectly affected, but that no discrimination can be made in favor of the citizens of one State in matters affecting inter-State commerce, nor can there be any regulation of commerce. *County of Mobile v. Kimball*, 102 U. S. 691; *Webber v. Virginia*, 103 id. 344; *Machine Co. v. Gage*, 100 id. 676; *Cook v. Pennsylvania*, 97 id. 566; *Waring v. Mayor*, 8 Wall. 110; *Pervear v. Com.*, 5 id. 475; *Licenses*

Coles v. Peck.

Tax Cases, id. 462 ; *McGuire v. Com.*, 3 id. 387 ; *Brown v. Maryland*, 12 Wheat. 419. Many acts of legislation indirectly affecting commerce have been upheld, and the general rule is that if the legislation does not assume the form or effect of a regulation of commerce, it will not violate the National Constitution. *Munn v. Illinois*, 94 U. S. 113 ; *Sherlock v. Alling*, 93 id. 99 ; *State Tax Case*, 15 Wall. 284 ; *Cooley v. Board etc.*, 12 How. 299 ; *Harrigan v. Connecticut River, etc., Co.*, 129 Mass. 580 ; s. c., 37 Am. Rep. 387 ; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12.

The State has power to lay taxes on property bought within its limits, and intended to be ultimately transported to another State for sale or use. A statute providing for the assessment of taxes in such a case is not in conflict with the provision of the Constitution of the United States which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Art. 1, § 10, Constitution of U. S. This provision does not apply to articles brought into one State from another, nor to articles intended to be carried out of one State to another, but applies only to intercourse with foreign nations. *Woodruff v. Parham*, 8 Wall. 123 ; *Hinson v. Lott*, id. 148 ; *Machine Co. v. Gage*, *supra* ; *Brown v. Houston*, *supra* ; *City of New Orleans v. Eclipse, etc., Co.*, 33 La. Ann. 647 ; s. c., 39 Am. Rep. 279 ; *State v. Pinckney*, 10 Rich. (Law) 474 ; *Harrison v. Mayor, etc.*, 3 Sm. & M. 581.

Judgment affirmed.

COLES V. PECK.

(96 Ind. 388.)

Landlord and tenant — tenant erecting building — election to renew or purchase.

A lease provided that the lessee might erect a building, and that at the end of the term the lessor might elect to renew the lease, or to buy the building or sell the lot, at a price to be ascertained by arbitrators. The lessee built, but the lessor failed to elect. The lessee then elected to purchase the lot, but the lessor refused to join in an arbitration to fix the price. *Held*, that the lessee was entitled to equitable relief.

ACTION for rent. The opinion states the case. The plaintiff had judgment below.

A. C. Downey, for appellants.

J. S. Jelley, for appellee.

NIBLACK, J. On the 6th day of March, 1873, Eliza Peck, by an instrument in writing, mutually executed, leased to Reece N. P. Buchanan and James Buchanan, a lot of ground in the city of Rising Sun, for a period of ten years at the rent of \$50 per year, payable annually in advance, the term to commence on the 10th day of March, 1873, and end on the 10th day of March, 1883, and the lessees to have the privilege of erecting on the lot, and occupying during their term, a two-story brick house, suitable for business purposes. The instrument contained the following additional provisions:

“And it is further agreed between said parties, and made part of the conditions of this lease, that at the expiration of the same the said lease is to be renewed and continued for another term of time of ten years on the same terms, that is to say, \$50 per year, or the party of the first part is to purchase the building and improvements from the party of the second part or the party of the second part is to purchase the grounds. Either one of the three is to be done, and that at the option of the party of the first part, and she shall notify the other party twelve months before the expiration of the time which one she will elect to do. And in case the lease is not renewed, and a sale is to take place as in either case above named, then each party is to choose a competent disinterested freeholder who shall appraise the value of the ground or building, as the case may be, and they shall have power, in case they see proper to choose a like third person, and the party who is to purchase shall pay to the other the amount so stated by them to be the value. And if this lease is renewed for the second term of ten years, then at the expiration of that time sale from one to the other shall be made as above stated, either the land to the party of the second part or the building to the first party, to be determined as above set forth. And all the terms, covenants and conditions of this lease shall extend to the heirs, administrators, executors or assigns of the parties to the same.”

The Buchanans went immediately into possession and soon thereafter erected on the leased lot a two-story brick building of the value

Coles v. Peck.

of \$3,000. During the year 1877 all the interests and the estates of the Buchanans in the lease were assigned and transferred to John B. Coles and Daniel S. Wilber, who very soon went into and have ever since continued in possession of the leasehold premises.

On the 20th day of March, 1883, Eliza Peck, the lessor, commenced this action against Coles and Wilber by filing a complaint against them before a justice of the peace for the sum of \$50, as the amount alleged to be due in advance for rent of the leased lot from the 10th day of March, 1883, to the 10th day of March, 1884. Coles and Wilber appeared before the justice and answered: *First*, in general denial. *Second*, By way of cross complaint, setting up the lease and the matters connected with it herein above referred to, and averring the performance of all the covenants and conditions of the lease on their part; also averring that the plaintiff failed to elect whether she would renew the lease, or purchase the building on the leased ground, or sell the ground to the defendants, and to notify the defendants of her election in the premises twelve months before the expiration of the term of the lease, or at any other time; that on the 3d day of February, 1883, they, the defendants, elected to purchase the leased ground, and so notified the plaintiff; that they thereupon selected Richard M. Jones, a competent and disinterested freeholder of said city of Rising Sun, as an appraiser to appraise said leased ground, fixing the time for said appraisement for the 10th day of March, 1883, and the place at the front door of the building on the leased ground, of all which they notified the plaintiff in writing on said 3d day of February, 1883; that on the 10th day of March, 1883, the said Richard M. Jones appeared at the time and place named in the above mentioned notice in writing, but the plaintiff failed and refused to select any person on her part to appraise the leased ground which the defendants had so elected to purchase; that the plaintiff so failing and refusing, the defendants immediately selected George B. Gibson, also a competent and disinterested freeholder of the city of Rising Sun, to act also as an appraiser of the leased ground in question; that the said Jones and Gibson then and there proceeded to appraise said leased ground, and appraised the same at \$322, of which they at once gave notice in writing both to the plaintiff and defendants; that after receiving notice of such appraisement, that is to say on said 10th day of March, 1883, the defendants tendered to the plaintiff, and offered to pay her, in legal tender United States treasury notes,

said sum of \$322, on condition that she would make and deliver to them a good and sufficient deed of conveyance for said leased land, but the plaintiff refused to accept said sum of money as well as to execute such a deed; that the defendants were ready and willing to pay said sum of money on the condition of receiving a deed, and would pay the money into court at any time when required so to do, as a means of obtaining a specific performance of the contract contained in the lease. Wherefore the defendants demanded a specific performance of said contract, and damages in the sum of \$3,000, as well as all other proper relief.

The justice certified the cause to the Circuit Court, upon the ground that the matters alleged in the cross complaint put in issue the title to real estate.

In the Circuit Court a demurrer to the cross complaint was sustained, and a trial resulted in a finding and judgment for the plaintiff in the sum of \$50.

Error is first assigned upon the decision of the Circuit Court sustaining the demurrer to the cross complaint ; but as preliminary to the consideration of the question of the sufficiency of that pleading, the appellee has moved to dismiss this appeal, upon the ground that the action was commenced before a justice of the peace, and that the amount in controversy below did not really exceed \$50.

[Omitting this point.]

The facts alleged in the cross complaint present some more novel and much more difficult questions. The first is : Did the failure of the appellee to avail herself of the option reserved to her in the lease transfer to the appellants the right to exercise a similar option on their part ?

Viner, in his General Abridgment, in volume 9, on page 362, says : " If a man sells trees growing upon his land, excepting six oaks, the exceptor is to have the election, and if there be a time limited, he must do it during such time, but if he slip the time, then the other shall elect." Story on Contracts, at section 816, in treating of alternative contracts, concludes : " But if the person, by his own wrong or default, lose his election,—as if he be bound, in the alternative, to do one of two things by a certain day, and he suffer the day to pass, without making an election by performing one or the other, the other party may elect which he will demand." Bouvier, in his Institutes, volume 1, section 693, holds a similar doctrine, saying : " The right to choose which of two things is to

be delivered to fulfil an alternative obligation, called the right of election, is vested in the party to whom it is given by the agreement; but when there is no one selected to exercise this right, it belongs to the first agent, or him who is to do the first act, and on his failure to exercise it in proper time, the right passes to the other party."

From illustrations given and various exceptions noted, the doctrine of these extracts is only applicable to alternative obligations which are distinctly disjunctive, and not to cases in which the law, or the evident intention of the parties, implies an election. As thus distinguished, this doctrine is, to a greater or less extent, supported by the cases of *Duerson v. Bellows*, 1 Blackf. 217; *Conwell v. Smith*, 8 Ind. 530, and *Ireland v. Montgomery*, 34 id. 174, and may as we believe be safely applied to the alternative reservations contained in the case before us. Consequently, when the appellee failed to exercise her right of election, under the lease, her right in that respect passed over to the appellants.

The next question is, did the appellants properly proceed in the appraisement, or attempted appraisement, of the leased ground?

A learned author states the law in cases analogous to this, to be that "where a lease stipulated that at the close of the term the value of the building should be appraised by persons to be chosen by the parties, and that the lessor should purchase the buildings of the lessee at the price so set by the appraisers, it was held that before the lessee could sue for the value of the buildings he must show that he had done all that was reasonably in his power to have the appraisement made; that having shown this, and that his efforts had been vain, he might then sue for the fair value. * * * The duty of procuring the decision of the referee in cases like the foregoing rests primarily upon the party who will have the claim for payment; i. e., upon the plaintiff in the suit to be brought after the right of action shall have accrued. He must use his best exertions to bring about and perfect the agreement of reference. And it seems that his failure to bring it about will enable him to institute suit without delay, only in case the obstacle to his success has grown out of the contumacious action of the other party. The debtor cannot, by preventing the perfection of the reference, escape the liability to be sued." *Morse Arb. & Award*, 94.

As to the proper remedy to be pursued in cases similar to, or of

the general class of the one made by the cross complaint in this case, there is some conflict in the authorities.

In the case of *Milnes v. Gery*, 14 Vesey Jr. 400, which has become a leading case of its class, it was held that where a sale was provided for in a lease at a price to be fixed by two persons to be mutually chosen, or by an umpire to be appointed by the persons so chosen in case of disagreement, and where the appraisers failed to agree upon the price or the person to be appointed as umpire, a bill would not lie for a specific performance of the contract of sale, upon the ground that the contract was incomplete and inoperative until the price was determined according to the provisions of the lease, and that case has been followed by some cases in this country, notably those of *Greason v. Keteltas*, 17 N. Y. 491, and *Hopkins v. Gilman*, 22 Wis. 476, holding that for the wrongful failure to complete an agreement for reference the proper remedy was by action at law for the recovery of damages. The doctrine of that case has however generally been followed by the courts of the United States only in a limited and restricted sense, and is mainly applied only to contracts for reference in which by the form and language of the stipulation the mode of determining the price by values on arbitration is made an essential provision — in fact condition — to the validity of the agreement, and to cases in which the parties can be easily placed *in statu quo*, or where an action for damages can be made to afford an adequate remedy.

There is another recognized class of contracts providing a mode for ascertaining the price of property by arbitration or reference, in which the language used in the stipulation is treated as non-essential and as more in the nature of a suggestion, regarding the stipulation itself as virtually an agreement to sell the property at a fair price.

Concerning this latter class of contracts, Pomeroy in his work on the Specific Performance of Contracts says: "If the means specified for fixing upon the price fail for any reason, the court does not treat the contract as fatally defective; but will, in the suit for a specific performance, direct a fair and reasonable price to be ascertained in some manner preliminary to the decree, either by referring the matter to a master or other officer, or by appointing a skilled person as a special valuer, or even by determining the amount itself; it will pursue any such mode as the circumstances of the case show to be expedient. The tendency of the later Eng-

lish decisions is to consider these stipulations for a determination of the price by third persons, rather as matters of form than of substance ; to construe them in such manner that they become incidental only to the main object of the agreement. * * * The result is that while the doctrine of *Milnes v. Gery* and of the class of cases to which it belongs has not been repudiated and is even now enforced, yet it is carefully restricted to the kind of contracts already mentioned ; the court will treat the contract as falling within the second class, unless it would thereby do violence to the language and thwart the plain intent of the parties." §§ 148-152, and notes.

Waterman, in his treatise on Specific Performance, states the rule to be that "Specific performance cannot be enforced of an agreement that property shall be sold at a price to be determined by valuers if no valuation be made ; nor the appointment of valuers decreed, or any other mode of determining the price, be substituted by the court, unless there has been such acquiescence in, or part performance of the contract as would render it inequitable not to enforce its execution, in which case the court will determine what is a fair value." Waterman Spec. Perform., § 44.

In Wood on Landlord and Tenant, 673-4, it is said: "Where the lease contains a covenant for the renewal of a lease, on a valuation or appraisal by arbitrators, and the lessor will not comply with the terms of the covenant, and agree upon arbitrators or submit the matter to them, a court of equity will not decree a specific performance of that part of the covenant, but will receive evidence of the value, and compel the execution of a lease as agreed. * *

* If the arbitration fails by reason of the arbitrators chosen being unable to complete the reference, and the parties failing to agree on another umpire, the lessee may maintain an action of an equitable nature to compel the execution of a renewal lease, and have a reference to ascertain what the amount of rent should be."

In the case of *Tscheider v. Biddle*, 4 Dillon, 55, a case very similar to the one at bar in many of its essential facts, the court stayed the proceedings in an action at law for the collection of rent until the lessor should appoint an appraiser to value the land in accordance with the terms of the lease.

As bearing on the same general subject, reference is made to the following cases: *Lowe v. Brown*, 22 Ohio St. 463; *Tobey v. County*

 Terre Haute and Indianapolis Railroad Company v. Buck.

of *Bristol*, 3 Story, 800; *Biddle v. Ramsey*, 52 Mo. 153; *Hug v. Van Burkleo*, 58 id. 202.

The weight of American authority unmistakably supports the conclusion that in cases of the same general character as this, equity will take jurisdiction and grant such relief as may seem to be most expedient, or most in accord with the spirit of the agreement looking to the sale of the property.

We do not hold that the report of the arbitrators chosen by the appellants in this case is conclusive upon the appellee as to the value of the leased lot. We hold only that the averments of the cross complaint are sufficient to show that the appellants have done all that they reasonably could do to consummate the agreement for reference contained in the lease, and have, for that reason, presented a good *prima facie* case for equitable relief. *Strohmaier v. Zepfenfeld*, 3 Mo. App. 429. See also *Lowe v. Brown*, *supra*; *Hall v. Warren*, 9 Ves. Jr. 605; *Gourlay v. Duke of Somerset*, 19 Ves. 429; *Dinham v. Bradford*, L. R., 5 Ch. App. 519; *Richardson v. Smith*, id. 648; *Gregory v. Mighell*, 18 Ves. Jr. 328; *Jackson v. Jackson*, 19 Eng. L. & E. 545; *Dunnell v. Keteltas*, 16 Abb. Pr. 205; *Arnot v. Alexander*, 44 Mo. 25; *Biddle v. Ramsey*, *supra*; *Kelso v. Kelly*, 1 Daly, 419; *Backus's Appeal*, 58 Penn. St. 186; *Norris v. Jackson*, 3 Giff. 396; *Parker v. Taswell*, 2 De G. & J. 559; *Jackson v. Jackson*, 1 Sma. & Giff. 184.

The judgment is reversed. with costs, and the cause remanded for further proceedings.

 TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY V. BUCK.

(98 Ind. 343.)

Damages — proximate cause — negligence — contributory.

Where one is injured by the negligence of another, and the injury renders the system more susceptible to disease and less able to resist it, and death results, from such disease, the death is legally attributable to such negligence.*

Where a railroad train overshoots a station, and is stopped at a dangerous place, in a dark night, it is not necessarily negligent for a passenger to alight. †

* To same effect, *Baltimore City Pass. Ry. Co. v. Kemp* (61 Md. 74), 48 Am. Rep. 184.

† See *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489.

Terre Haute and Indianapolis Railroad Company v. Buck.

ACTION of damages for death of plaintiff's intestate by negligence. The opinion states the facts. The plaintiff had judgment below.

J. G. Williams, B. Harrison, W. H. H. Miller and J. B. Elam, for appellant.

G. W. Paul, M. D. White and J. E. Humphries, for appellee.

ELLIOTT, J. On the night of December 9, 1881, the appellee's intestate, Andrew J. Buck, took passage on one of the appellant's passenger trains at the town of Darlington for the station of Sugar Creek, not far distant. Both these places were regular stations of the company, at which passengers were received and discharged, and the train on which deceased took passage stopped at Sugar Creek. About the time the train usually arrived at this station, and at the place where the signal whistle for the station was usually sounded, the engineer caused the customary signal to be given, and applied the brakes, but the brakes did not stop the train, and it ran by the station and was stopped on a trestle bridge, three hundred and eighty-five feet beyond the usual stopping place. The deceased stepped from the car in which he was sitting and fell through the bridge, a distance of nineteen feet, and struck upon the rocks which formed the bed of the stream spanned by the trestle-work. The night was dark, and there were no lights about the place where the train was stopped, and the length of the stop was about that ordinarily made at small passenger stations. The regular station was a safe place to alight, and the deceased lived not far distant, and was acquainted with the station and its surroundings. The station had not been called at the time the deceased left the train, but there was evidence showing that it was not the custom of the railroad company's employees to call the name of the station.

The deceased was found in the creek, and if not delirious when first reached, very soon became so, and was taken to a house near by. It was not far from eight o'clock when he fell from the trestle-work, and the physician who reached him at half-past ten o'clock thus describes his condition: "I found him lying upon the bed on his left side, his head somewhat elevated, his body in a perspiration, right leg drawn up, left extended; there was a cut on his chin — on the left side — it was about an inch and a half long;

Terre Haute and Indianapolis Railroad Company v. Buck.

his left ankle was swollen, blood clot on either side, and there was a bruise on his back, low down ; his eyes were closed, one of the pupils of his eyes was larger than the other, one dilated and the other contracted ; he seemed to be suffering pain, groaning and crying, and asking, 'Where am I ?' 'What has happened ?' 'Where is Bess ?' that is the name by which he called his wife ; his sense of hearing seemed to be not acting, as he would not respond to questions except by a groan." The witness then stated that he took the temperature of his patient's body, and stated the result of his examination in detail. Visits were made on the 10th, 11th and 14th days of December, and the deceased was still suffering from the pain in his head. In answer to a question, the physician said : "He was suffering from what we call a concussion of the brain ; it continued until January 14, 1882, the day of his death." A visit was made on the 16th day of December, and from that time visits were made daily, and oftener until the death of the patient. A graphic description of the progress of the case was read from a book called "The Physician's Case Book," and from this testimony it appeared that the pain in the head and the surgical fever found present on the 10th day of December continued until the end, but that typho-malarial fever had supervened, and that the immediate cause of death was hemorrhage from the bowels. The medical witness was asked on cross-examination how the injury contributed to the death of his patient, and he answered : "By receiving a fall on the 9th of December, and in that fall receiving a concussion of the brain. There was a condition of the brain in which his nervous system was affected, and by the sprained ankle which confined him to his bed ; and the injury under his jaw and on his back, by confining him to his bed, put his system in a favorable condition to take on disease — whatever the disease prevailing in the community might be, and the result of his being confined to his bed and the surgical fever he had following these injuries. He gradually drifted into malarial troubles, which were then rife in our community. The shock that his nervous system had received and the depressing influence it had upon his system had rendered it less able to bear the continued fever and typho-malarial fever, and this surgical fever put him in a condition to take on malarial fever, and the result of this malarial fever was hemorrhage of the bowels, from which he died." At another place in his testimony the witness said that the injuries did, in one sense,

Terre Haute and Indianapolis Railroad Company v. Buck.

produce the fever which resulted in death. Dr. Hopper, another physician, testified that he visited the deceased on the 11th day of January, and in answer to an interrogatory gave it as his opinion "That the fall contributed to his death—the injuries received from falling off the trestle." It was proved that the malarial fever was epidemic in the vicinity of Sugar Creek station, and that the deceased, prior to the fall from the trestle-work, was in robust health.

The contention of the appellant is that the evidence does not show that the injuries received by Andrew J. Buck caused his death.

In order to discover a principle which will lead to a just decision of the question here confronting us it will be necessary to reason from analogous cases, for we have found no case precisely in point, nor have we found in any text-writer a rule which governs such a case as this. A long settled rule of the common law, adopted and enforced in criminal cases, supplies a close analogy. One of the most philosophical of our law-writers thus states this ancient rule : "Now these propositions conduct us to the doctrine that whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death follows, he will be deemed guilty of the homicide though the person beaten would have died from other causes, or would not have died from this one had not others operated with it; provided the blow really contributed either mediately or immediately to the death, in a degree sufficient for the law's notice." 2 Bish Cr. L., § 637. At another place this author says : "And the wound need not even be a concurrent cause ; much less need it be the next proximate one ; for if it is the cause of the cause no more is required." 2 Bish. Cr. L., § 639. The greatest names among the sages of the law are arrayed in support of this doctrine. 1 Hale P. C. 428 ; 1 Hawk. P. C. 93. It is sustained by the English, American and Prussian courts. It is the law of this State as declared in at least two cases, one of which was well discussed. *Kelley v. State*, 53 Ind. 311 ; *Harvey v. State*, 40 id. 516. If it is sufficient to show in cases where life and liberty are involved that the wrong was the "mediate cause," it must surely be sufficient where nothing more than money is involved.

In close agreement with the fundamental principle of which we have just spoken is the doctrine of the court in *Jeffersonville, etc., R. Co. v. Riley*, 39 Ind. 568, where it was held

Terre Haute and Indianapolis Railroad Company v. Buck.

that the trial court properly refused to instruct the jury, in an action like this, that "the injury complained of cannot be regarded as the proximate cause of death, if the deceased had a tendency to insanity and disease, and the injury received by him, producing his death, would not have produced the death of a well person." Straight in line with our own case is that of *Drake v. Kiely*, 93 Penn. St. 492. In that case a lad was taken against his will on a freight train and carried a distance of five miles. He returned home on foot running most of the way, became ill, and the ultimate result was that he became crippled in both legs, and it was held that the defendant was liable for all the injuries received. The court said the true rule is that the proximate cause must be determined by the jury upon all the facts in the case.

If we were to undertake to declare any other rule than that stated in the case cited, we should be involved in inextricable confusion, for it is clear that the passenger who suffers, as the appellee's intestate did, injuries of a serious character, is entitled to some damages, and it is impossible for any one to pronounce as matter of law, at what point the injury flowing from the wrong terminated. The only possible practical rule is that the wrong-doer, whose act is the mediate cause of the injury, shall be held for all the resulting damages, and that the question of whether his wrong was the mediate cause is one for the jury. But there are other cases sustaining the doctrine of this court. In *Ginna v. Second Avenue R. Co.*, 8 Hun. 494, affirmed on appeal, 67 N. Y. 596, the plaintiff received an injury through the negligence of the railroad company, which resulted in the development of a poisonous discharge causing death, and the company was held liable. It was there said: "More attentive treatment might have saved the life of the young man, but its necessity was not apparently suspected. He was subjected to that which was followed and designed to be proper by the wrongful act of the defendant. That was the cause which placed his life in jeopardy, because it produced the wound whose poisonous discharges resulted in his death." So it may be justly said of this case, it was the wrongful act of the appellant which placed the intestate's life in jeopardy. He who wrongfully places another's life in jeopardy is responsible for the loss of that life; the appellant did place the intestate's life in jeopardy, and is therefore responsible. The case of *Brown v. Chicago, etc., Ry. Co.*, 54 Wis. 342, s. c., 41 Am. Rep. 41, is strongly in point, and contains an exhaustive review of

Terre Haute and Indianapolis Railroad Company v. Back.

the authorities. In that case a pregnant woman was carelessly directed by a brakeman to leave the train at a point three miles short of her station, and she walked to her destination. This walk brought on miscarriage and illness, and it was held that for these consequences the carrier was responsible. Many cases are cited in support of this ruling. A like decision was rendered in *Houston, etc., R. Co. v. Fredericka*, by the Supreme Court of Texas, see 41 Am. Rep. 56, note, and in *Fitzpatrick v. Great Western Ry. Co.*, 12 U. C. Q. B. 645, a similar ruling was made. In *Brown v. Chicago, etc., Ry. Co.*, *supra*, it was said of *Pullman, etc., Co. v. Barker*, 4 Col. 344; s. c., 34 Am. Rep. 89, that it is "unsustained by authority." The decision in *Sauter v. New York, etc., R. R. Co.*, 66 N. Y. 50; s. c., 23 Am. Rep., 18, is that the representatives of one injured through the negligence of a railroad company are entitled to recover damages caused by his death, although the immediate cause of death was the mistake of the surgeon who treated him. In *Williams v. Vanderbilt*, 28 N. Y. 217, the carrier's negligence caused a passenger to be detained several weeks on the Isthmus of Panama, where he contracted a local fever which disabled him for a long time after his return to New York, and this resulting injury was held a ground of recovery. A man by a wrongful act frightened a woman and caused her to flee from her house. In her flight she fell from a fence, and a miscarriage and illness resulted, and the defendant was held liable for this consequential injury. *Barbee v. Reese*, 60 Miss. 906. In the same line, but not quite so closely analogous, is the case of *Pennsylvania Co. v. Hoagland*, 78 Ind. 203, approved in *Lake Erie Ry. Co. v. Fix*, 88 id. 381; s. c., 45 Am. Rep. 464, and *Louisville, etc., R. Co. v. Kelly*, 92 Ind. 371; s. c., 47 Am. Rep. 149, where it was held that damages were recoverable for illness caused by exposure to cold resulting from carelessness in directing a passenger to alight at the wrong station.

It will be found on investigation that the decisions we have referred to are really members of an old and long established class of cases going back as far at least as the case so famous in the books as the "*Squib case*." They do no more than apply a well-known principle to new and peculiar instances. This general doctrine is well stated in *Baltimore, etc., R. Co. v. Reaney*, 42 Md. 117, where it was said: "The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical

Terre Haute and Indianapolis Railroad Company v. Buck.

rule, that the efficient and predominating cause, in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned." At another place in the same opinion it is said: "To entitle such party to exemption, he must show not only that the same loss might have happened, but that it must have happened if the act complained of had not been done. *Davis v. Garrett*, 6 Bing. 716." In a recent work it is said: "Any wrongful act which exposes one to injury from rain, heat, frost, fire, water, disease, the instinctive or known vicious disposition or habits of animals, or any other natural cause, under circumstances which rendered it probable that such an injury will occur, is a primary, efficient and proximate cause, if the injury ensue. Many such cases have been referred to in the preceding pages." 1 Sutherland Dam. 62.

In *Byrne v. Wilson*, 15 Irish C. L. 332, a stage-coach in which the plaintiff's intestate was a passenger was thrown into a canal by the negligence of the driver, and the lock-keeper turned on the water, thereby causing the death, by drowning, of the passenger, and it was held that the proprietor of the coach was liable under Lord Campbell's Act, the court saying: "The precipitation of the omnibus into the lock was certainly one cause, and (as it may be said) the primary cause of her death, inasmuch as she would not have been drowned but for such precipitation. It is true that the subsequent letting of the water into the lock was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the necessary consequence of the previous precipitation, by the negligence of defendant's servants. But in my opinion defendant is not relieved from liability for his primary neglect, by showing that but for such subsequent act the death would not have ensued." The chief justice, in his opinion, said: "The law is clear that every party is liable, not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence or of negligence in breach of a duty which imposed the necessity of care and caution upon him." Proceeding upon the general rule we have stated, the court, in *Eaton v. Boston, etc., R. Co.*, 11 Allen, 500, said: "And it is no answer to an action by a passenger against a carrier, that the negligence or trespass of a third party contributed to the injury." A

Terre Haute and Indianapolis Railroad Company v. Buck.

like ruling was made in *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230.

The case of *Hatchell v. Kimbrough*, 4 Jones L. 163, supplies an instructive illustration of the rule. There a roof was removed from a house, and the eye of the plaintiff was lost in consequence of the exposure resulting, and the defendant was held liable. The general rule is recognized and enforced by our own cases. *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166; s. c., 40 Am. Rep. 230; *City of Crawfordsville v. Smith*, 79 Ind. 308; s. c., 41 Am. Rep. 612; *Binford v. Johnston*, 82 Ind. 426; s. c., 42 Am. Rep. 508; *Dunlap v. Wagner*, 85 Ind. 529; s. c., 44 Am. Rep. 42; *Louisville, etc., Ry. Co. v. Krinning*, 87 Ind. 351.

We turn now to the cases cited by the appellee. We have already shown by the quotation made from the able opinion in *Brown v. Milwaukee, etc., R. Co.*, *supra*, that the case of *Pullman, etc., v. Barker*, 4 Col. 344; s. c., 34 Am. Rep. 89, is not sustained by authority, and we now add that it cannot be supported on principle. The cases of *Krach v. Heilman*, 53 Ind. 517, and *Collier v. Early*, 54 id. 559, were shown in *Dunlap v. Wagner*, 85 id. 529, to be in conflict with the cases of *Schlosser v. State*, 55 id. 82; *Fountain v. Draper*, 49 id. 441; *Barnaby v. Wood*, 50 id. 405, and *English v. Beard*, 51 id. 489, and to be condemned by other courts as well as by text-writers. It remains to add that the cases of *Ryan v. New York, etc., R. Co.*, 35 N. Y. 210, and *Fairbanks v. Kerr*, 70 Penn. St. 86; s. c., 10 Am. Rep. 664, on which the cases of *Krach v. Heilman*, *supra*, and *Collier v. Early*, *supra*, are mainly founded, are in direct conflict with the decision in *Louisville, etc., Ry. Co. v. Krinning*, 87 Ind. 351. Not only is this true, but it is also true, as shown by Judge Cooley, that the cases of *Ryan v. New York, etc., R. Co.*, *supra*, and *Fairbanks v. Kerr*, *supra*, are everywhere repudiated. Cooley Torts, 76 n. The courts of New York have not followed *Ryan v. New York, etc., R. Co.*, *supra*, as very clearly appears from the decisions in *Webb v. Rome, etc., R. Co.*, 49 N. Y. 420; s. c., 10 Am. Rep. 389; *Pollett v. Long*, 56 N. Y. 200; *Wasmer v. Delaware, etc., R. Co.*, 80 id. 212; s. c., 36 Am. Rep. 608. We need not stop to inquire whether the case of *Scheffer v. Railroad*, 105 U. S. 249, is sustained by authority or not, for it is readily discriminated from the present case; there the court held that the representatives of one who became insane from an injury received in a collision, and

Terre Haute and Indianapolis Railroad Company v. Buck.

eight months afterward took his own life, could not recover. The court said: "The proximate cause of the death of Scheffer was his own act of self destruction. * * The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad." There is a plain difference between the case cited and the one at bar. In the former the immediate cause of death was an independent agency, and between the original injury and the death many other causes had intervened and a long time had elapsed; while in this case the death occurred soon after the injury, and the effects of the injury were unbroken and continuous from the time it was received until death ensued. In the case cited the violent act of the man himself produced the death; while in the one in hand a disease superinduced by the injury caused the death, and there was no break in the line of causation.

A carrier of passengers is held to the exercise of a very high degree of care, and for a failure to use this care is responsible to a passenger who suffers an injury in a case where no fault of his contributes. It was said by this court in *Jeffersonville, etc., R. Co. v. Hendricks*, 26 Ind. 228, in speaking of the duties of railroad companies: "But they are required to exercise the highest degree of care to secure the safety of passengers, and are responsible for the slightest neglect, if an injury is caused thereby." There are many cases in our own reports to the same effect. *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339; *Thayer v. St. Louis, etc., R. Co.*, 22 id. 26; *Sherlock v. Alling*, 44 id. 184; *Louisville, etc., R. Co. v. Kelly*, *supra*. The rule is stated in stronger terms by the courts elsewhere as well as by the text-writers. *Hutch. Carr.*, §§ 500; 501, *n*; *Thomp. Carr.* 200, 204,

It is the duty of railroad carriers of passengers to stop at the regular stations and at safe places for alighting. Thompson says: "It is the duty of the servants of the railway company to run their trains so that a passenger shall have a reasonably safe and convenient place for alighting." *Thomp. Carr.* 228. This is substantially declared in *Jeffersonville, etc., R. Co. v. Parmalee*, 51 Ind. 42. In *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466; *s. c.*, 7 Am. Rep. 699, the court said in a case very like the present: "Stopping the train at an unusual place, rendered the company presumptively in the wrong to that extent, and the *onus* of explain-

Terre Haute and Indianapolis Railroad Company v. Buck.

ing this neglect was thrown upon the defendants." Shearm. & Redf. Neg., §§ 12, 280; *Curtiss v. Rochester, etc., R. Co.*, 29 Barb. 282; Angell Carr., § 569; 2 Redf. Railroads, § 176. It is said by Hutchinson: "The passenger is entitled not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping." Hutch. Carr., § 612. In *Praeger v. Bristol, etc., Ry. Co.*, 24 L. T. (N. S.) 103, the train ran by the platform and the passenger was injured in leaving the car. The carrier insisted that there was no evidence of negligence, but COCKBURN, C. J., said: "The question is whether there was a want of reasonable care on the part of the company, and I think there was not only evidence but abundant evidence of this." The case of *Cockle v. South-Eastern Ry. Co.*, 27 L. T. (N. S.) 320, is very similar to the one just cited, and a like ruling was made. In the case last named it was said: "But it appears to us that the bringing up of a train to a final standstill, for the purpose of the passengers alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station." It is held in the case cited, and in many others, that where the stop is made at a dangerous place near the usual station, and about the usual time for stopping, the carrier should warn the passengers not to leave the train, or should apprise them of the dangerous place. *McLean v. Burbank*, 11 Minn. 277, *vide* opinion, p. 288; *Manry v. Talmadge*, 2 McLean 157, *Laing v. Colder*, 8 Penn. St. 479; *Stakes v. Saltonstall*, 13 Pet. 192; *Montgomery, etc., R. Co. v. Boring*, 51 Ga. 583. The case of *Pennsylvania R. Co. v. White*, 88 Penn. St. 327, is very like the present, and the plaintiff was held entitled to recover. The court said: "It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so. *Railroad Co. v. Arpell*, 23 Penn. St. 147." Applying the law as declared by the authorities cited, and many more might be added, it is clear that there was a breach of duty in running by the station and stopping at a dangerous place.

A rule adopted by this court and sanctioned by many authorities of the highest character here requires attention. That rule is thus

Terre Haute and Indianapolis Railroad Company v. Buck.

stated by Judge Redfield: "The fact that injury was suffered by any one while upon the company's trains as a passenger, is regarded as *prima facie* evidence of their liability." Redf. Carr., § 341. Professor Greenleaf's statement of the rule is substantially the same. 2 Greenl. Ev., § 227. Judge Cooley gives the question careful consideration, and makes a like statement of the rule. Cooley Torts, 660, 663.

In the early English case of *Christie v. Griggs*, 2 Campb. 79, it was said: "The plaintiff had made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered."

This rule has long been recognized by our cases as the correct one. In speaking of the effect of evidence of the fact that an injury was received by the passenger, it was said, in *Jeffersonville, etc., R. R. v. Hendricks*, *supra*: "Ordinarily such fact should be regarded at least as *prima facie* evidence of negligence on the part of the company," and this statement of the rule is adopted in the subsequent cases of *Sherlock v. Alling*, *supra*; *Pittsburgh, etc., R. Co. v. Williams*, 74 Ind. 462; *Cleveland, etc., Ry. Co. v. Newell*, 75 id. 542; *Memphis, etc., Co. v. McCool*, 83 id. 392; s. c., 43 Am. Rep. 71. In the case last named many authorities are cited, to which may be added *Railroad Co. v. Walrath*, 38 Ohio St. 461; s. c., 43 Am. Rep. 433; *Philadelphia, etc., R. R. Co. v. Anderson*, 94 Penn. St. 351; s. c., 39 Am. Rep. 787; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Roberts v. Johnson*, 58 N. Y. 613; *Pittsburgh, etc., R. Co. v. Pillow*, 76 Penn. St. 510; s. c., 18 Am. Rep. 424.

The rule is a general one, and is stated in general terms, and it is not to be understood that it goes on to the extent of supporting a claim to a recovery where the evidence shows there was no negligence on the part of the carrier, or rebuts the presumption of negligence. It must therefore be true in most instances that the negligence or freedom from negligence will appear from the evidence, because in proving the occurrence from which the injury resulted, the nature and cause of the accident will necessarily appear. Of course, if the evidence rebuts the presumption of negligence, there cannot be said to be a *prima facie* case, although there may be an accident and an injury.

In some of the cases the view is taken that if a thing occurs which ought not to have occurred, had the requisite degree of care been exercised, then the carrier must show that such care was exercised. In one case it was said: "But where the thing is shown to be under

Terre Haute and Indianapolis Railroad Company v. Buck.

the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from the want of care. *Scott v. London, etc., Co.*, 3 H. & C. (Exch.) 596. Of the case cited, a judge, perplexed by the confusion consequent upon the departure from the ancient rule, said: "I now gladly turn to one case, distinguished from the chaos of authorities depending on particular facts, by an attempt at the application of something in the nature of principle to cases of this class." *Flannery v. Waterford, etc., Ry. Co.*, 11 Irish C. L. 30. In the case at bar there was no evidence explaining the failure to stop at the regular station, nor was there any explanation of the failure to give warning; neither was there any explanation of the cause of stopping on the dangerous trestle bridge.

We think the evidence fully sustains the finding that there was negligence on the part of the appellant.

The remaining question is whether the intestate was guilty of such contributory negligence as bars a recovery. The question of contributory negligence is generally one for the jury, and courts interfere with the verdict only in clear cases. *City of Indianapolis v. Gaston*, 58 Ind. 224; *Pennsylvania Co. v. Hensil*, 70 id. 569; s. c., 36 Am. Rep. 188; *Louisville, etc., Ry. Co. v. Richardson*, 66 Ind. 43; s. c., 32 Am. Rep. 94; *City of Washington v. Small*, 86 Ind. 462, see page 469; *Pennsylvania R. Co. v. White*, 88 Penn. St. 327; *Willard v. Pinard*, 44 Vt. 34.

The court cannot declare as matter of law that a passenger is guilty of contributory negligence, who alights from a train on a dark night, after the customary signal has been given for stopping at his known destination, and the train has fully stopped near the usual alighting place and near the time when it was there due. We have already quoted from cases holding that a passenger who alights when a train is brought to a full stop near the usual alighting place is not guilty of contributory negligence in attempting to leave the train, unless it appears that the danger was apparent, and we now direct attention to other cases bearing upon the same subject. In *Robson v. North Eastern Ry. Co.*, L. R., 10 Q. B. 271; 12 Eng. Rep. 302, the train overshot the platform but the station was not called, and the passenger attempted to alight and was injured. It was held that a nonsuit was improperly directed. It was said "that there was

Terre Haute and Indianapolis Railroad Company v. Buck.

evidence from which the jury might have properly found that the plaintiff was invited, or had reasonable ground for supposing she was invited, to alight by the company's servants." The language of the court in *Curtis v. Detroit, etc., Ry. Co.*, 27 Wis. 158, clearly states a general principle applicable to this case: If under the circumstances of this case, the train in being brought up to the station came to a stop in such a manner as to induce the belief on the part of the passengers in waiting on the platform that it had stopped for the reception of passengers and then, when the passengers, acting on this belief, were going aboard, started again without caution or signal given, that would constitute an act of negligence on the part of the company, and be so without regard to the question whether the starting was one of necessity, or whether the stop was actual or only an apparent one. It was the duty of the company, if the passengers were not to enter the cars under such circumstances, to have some one there to warn and prevent them." In our own case of *Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441, a complaint, after alleging that the plaintiff took passage for Fort Branch, and like matters, stated that by the carelessness of the defendant the train stopped at the town of Fort Branch before that part of the train on which the plaintiff was seated had reached the depot, and that by reason thereof the plaintiff was compelled to jump from the car to the ground, and the complaint was held sufficient, the court saying: "As to the second objection it is sufficient to say that we do not understand from the averments that the rash conduct of the plaintiff produced the injury." In *Columbus, etc., Ry. Co. v. Farrell*, 31 Ind. 408, the general doctrine we have laid down is recognized and enforced.

In *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48, the court said: "Was not the attempt of the decedent to leave the cars, under the facts stated, 'made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom?' If it was, then the decedent was without fault or negligence; and in our opinion, the decedent was not guilty of negligence in attempting to leave the train under the circumstances." The question stated in this quotation is that which arises in all cases of a kindred character, and is one, as a general rule, to be left to the jury. The principle that a man is not guilty of contributory negligence who acts upon a reasonable belief arising from surrounding circumstances, is one of wide application finding

Terre Haute and Indianapolis Railroad Company v. Buck.

perhaps one of its most striking applications in that class of cases where a passenger leaves a train in order, as he believes, to escape impending danger. *Stokes v. Saltonstall, supra*; *Twomley v. Central Park, etc., R. Co.*, 69 N. Y. 158; s. c., 25 Am. Rep. 162, 164 n.; *Wilson v. North Pacific R. Co.*, 26 Minn. 278; s. c., 37 Am. Rep. 410; *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418; s. c., 38 Am. Rep. 597. In all such cases the passenger is excused even though his belief was an erroneous one, and but for his leaping from the train no injury would have resulted. Without going further into this subject, although many more authorities might be cited, we conclude by a quotation from a recent English author, who, after a thorough review of the adjudged cases, says: "But the question of what circumstances amount to an invitation to alight is clearly one for a jury; and although there seems to have been difficulty felt in time past by some of our judges in reference to this point of law, it seems impossible that any further doubt should exist." *Wood's Browne Carriers*, 507.

The principles we have stated rule the case and dispose of all the questions presented whatever form they may assume.

Judgment affirmed.

ON PETITION FOR A REHEARING.

ELLIOTT, J. We have given the elaborate brief filed on the petition for a rehearing careful study, but find nothing in it that shakes our confidence in the conclusions stated in our former opinion.

Counsel assume that the fever of which the plaintiff's intestate died was an independent cause, entirely separate from the injury received by the fall from the trestle-work. The evidence does not warrant this assumption, for it shows that the injury concurred in producing the fever, and also in producing the enfeebled condition which incapacitated the injured man from resisting the inroads of disease. There was not only a condition created which made it probable that the intestate would take on the disease, but there was also such an enfeeblement of the system as impaired its power to repel disease.

Counsel argue the case as though it were necessary that the evidence should show with direct and positive certainty that the injury produced death. The assumption upon which the argument rests cannot be made good. It is not necessary in any civil case to prove

Terre Haute and Indianapolis Railroad Company v. Buck.

the substance of the issue by direct or positive evidence. It is sufficient if there are facts fairly warranting the jury in inferring the conclusion insisted upon by the plaintiff. *Indianapolis, etc., R. Co. v. Collingwood*, 71 Ind. 476; *Indianapolis, etc., Ry. Co. v. Thomas*, 84 id. 194; 1 Greenl. Ev., § 13, n. In the case before us the evidence very clearly and fully warranted the inference that the injury concurred in producing death; indeed any other conclusion would be directly opposed to that which the evidence supports.

It was not necessary that the appellee should show that the injury was the sole or direct cause of the death. The conclusion stated in our former opinion is fully sustained by a case which has been brought to our attention since that opinion was written. The case to which we refer is that of *Beauchamp v. Saginaw, etc., Co.*, 50 Mich. 163; s. c., 45 Am. Rep. 30. In the course of the opinion the court said: "Is it clear beyond dispute, that the cold taken, pneumonia and death were independent and separate from the injury received and sickness resulting therefrom? Can it be said with judicial certainty that the injury, the sickness and weakness following therefrom did not directly cause or largely contribute to the attack of pneumonia, and that the party wrongfully injured was as able to withstand this resultant attack as he would have been if 'a good, healthy, well nourished boy,' as at the time he received the injury? If the injury received and sickness following concurred in and contributed to the attack of pneumonia, the defendant must be held responsible therefor. It cannot be said that here was a second wrongful act, or a disease, wholly independent of the first wrong, which caused the death of the boy. *People v. Cook*, 39 Mich. 239." The case in hand is in every feature infinitely stronger than the one from which we have quoted.

In commenting upon the case of *Baltimore, etc., R. Co. v. Reaney*, 42 Md. 117, cited in the former opinion, counsel criticise it with much severity, but their judgment is opposed by very weighty authority. The case is fully approved in *Beauchamp v. Saginaw, etc., Co.*, *supra*, and in the following text-books is cited with approval; Cooley Torts, 79; 2 Thomp. Neg. 1084; 3 Suth. Dam. 418. It is sustained by the English cases which are cited in the opinion of the court, and we are content to join them rather than follow counsel.

Cases are cited by counsel as to evidence of negligence in cases

Terre Haute and Indianapolis Railroad Company v. Buck.

where the relation of carrier and passenger does not exist, and all that need be said of them is that they have no application at all to a case like this, where the relation of carrier and passenger existed.

The general rule upon the subject of proof of negligence in a case like this, stated in our former opinion, is that laid down in *Jeffersonville, etc., R. Co. v. Hendricks, supra*, where it was held that proof of the happening of an accident to a passenger is *prima facie* evidence of negligence on the part of the carrier, and that rule has been enforced by many cases, as we have heretofore shown. We did not hold in our former opinion that the rule applied to a case where there was nothing more than a simple failure to stop at a regular station; we had no such case before us; but we did hold that the general rule applied to a case where the evidence showed that the train was stopped on a dangerous trestle-work after there had been an implied invitation to alight, and where no warning was given to the passengers to remain on the train. We have no doubt that such evidence makes a *prima facie* case which will prevail unless overcome by evidence from the carrier. The case of *Delaware, etc., R. Co. v. Naphes*, 90 Penn. St. 135, sustains our view and lends counsel no support. In that case it was said that the general rule was a reasonable one, "because the company has in its possession and under its control, almost exclusively, the means of knowing what occasioned the injury and of explaining how it occurred, while as a general rule, the passenger is destitute of all knowledge that would enable him to present the facts, and fasten negligence on the company, in case it really existed." Any other rule would practically absolve railway carriers from liability in a great majority of cases, for the passenger would seldom be able to ascertain the real cause of the accident. The case before us supplies an apt illustration of the unreasonableness of the rule for which the railroad company contends. How could Mr. Buck, made delirious by his fall from the trestle-work, have ascertained what caused the train to run by the station and stop a short distance beyond upon a dangerous trestle-work?

There was no evidence satisfactorily explaining the stopping of the train upon this trestle-work, and the failure to warn of danger the passenger that the conductor knew expected to alight at the station. Nor was there evidence explaining why the train ran by. There was evidence showing that the brakes slipped, but no evidence at all

showing that they were in order, were properly constructed, or even that they were properly applied. They may have been air brakes, and yet neither properly constructed, nor in good order, nor timely applied. The conductor, knowing that his passenger desired to alight, and knowing, as the evidence tended strongly to show, that the name of the little station was not usually cried, ought to have seen that the passenger was in some way notified of the dangerous stopping place. There were other facts tending to show negligence, as for instance that the men engaged in running the train were taken from other trains, and taking all the evidence together, it was abundantly sufficient to warrant the jury in inferring negligence.

We do not deem it necessary to again go over the authorities cited on the subject of contributory negligence; they fully sustain our conclusion. The question in *Cincinnati, etc., R. Co. v. Peters*, 80 Ind. 168, was one of pleading; here it is one of evidence. All that was decided in that case is stated in the opinion of WORDEN, J. The argument of Commissioner FRANKLIN was not approved. The case of *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48, fully sustains the conclusion reached by us. We quote: "Was not the attempt of the decedent to leave the cars, under the facts stated, 'made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom?' If it was, then the decedent was without fault or negligence; and in our opinion, the decedent was not guilty of negligence in attempting to leave the train under the circumstances. The train having very nearly come to a full stop, the decedent had the right to suppose that it would stop long enough for her to leave the train; and she had also the right to suppose that some of the agents of the company would be present to aid and assist her in leaving the cars, and if her just expectations had been realized, she could and would have safely left the train." So, in this case, if the railroad company had done its duty, or had conformed to its usual practice, the deceased's reasonable expectations would have been realized, and he could have left the train in safety. The text-writer referred to by counsel gives their argument no support, for he says, as we have said, that the question of contributory negligence is "in every instance of the kind one of fact for the jury." Hutch. Carr., § 615. It is also said by this author: "Such companies must be extremely careful not to mislead their passengers into the belief that the halt-

Hartford v. State.

ing of a train at a station is meant as an invitation to them to alight where it is not so intended, and that if the conduct of the servants engaged in its management is such as may reasonably produce that impression, and the passenger so understands it, and in the attempt to leave the coach at a place where there are no facilities provided for his doing so, and whilst in the exercise of due diligence he is injured, the company will be liable."

In the case in hand we need not inquire what effect uncontradicted evidence, that it has been the uniform custom to call the station before permitting passengers to alight, would have had, for there was evidence tending to show that there was no such custom, and that the station was very seldom called.

Petition overruled.

HARTFORD V. STATE.

(96 Ind. 461.)

Criminal law — libel — mitigation.

On a criminal prosecution for libel the defendant may show in mitigation that the libel was provoked by a libel upon him by the prosecuting witness.

CONVICTION of libel. The opinion states the point.

A. C. Downey, W. R. Johnson and E. M. Griffith, for appellant.

F. T. Hord, attorney-general, and *E. G. Hay*, prosecuting attorney, for the State.

HAMMOND, J. Indictment in two counts for libel. The appellant's motion to quash was sustained as to the first, and overruled as to the second count. Plea, not guilty; trial by jury; verdict of guilty, and fine of ten dollars; motion for a new trial overruled, and judgment on the verdict.

[Omitting other points.]

The prosecuting witness in this case was the county superintendent of schools in Switzerland county. At a meeting of the county board of education, presided over by the prosecuting witness, a change of certain text-books was made to the advantage, or supposed advantage, of a publishing-house in Cincinnati. The appel-

lant published in a newspaper in said county, over his own signature, an article, entitled "A true statement of the facts," the substance of which was that an agent of the publishing-house referred to had employed the appellant and the prosecuting witness to procure the change of the text-books by their influence before the board of education; that they used their influence with success in this matter, and that for so doing they received from the agent of the publishing-house \$125, which was paid by the agent to the appellant and by him divided with the prosecuting witness. A copy of the publication was set out in each count of the indictment. The second count alleges that the appellant charged in such publication that the prosecuting witness was bribed by the agent of the publishing-house and by the appellant in the matter of the change of text-books. It is claimed that there is a variance between the publication and the averments in the indictment as to the charges made in the publication, but in this we think the appellant's counsel are in error. The charges made against the appellant in the indictment are in all substantial respects sustained by the publication in question. The surname alone of the prosecuting witness appears in the article complained of, but the indictment charges that it was published of and concerning such witness. This was sufficient to show that the charges made in the publication related to the county superintendent, whose full name is set out in the indictment as being the person injuriously affected by the alleged libel.

The publication in question was clearly libellous. Whether it charged the prosecuting witness with a crime need not be decided. It imputed to him official corruption, and this, if believed, would certainly degrade him in the estimation of the public. A publication may be libellous without charging the commission of crime. *State v. DeLong*, 88 Ind. 312; *Johnson v. Stebbins*, 5 id. 364. There was no error in overruling the motion to quash the second count of the indictment.

The prosecuting witness, who testified in the case, had, as he admitted, published articles in a newspaper in reference to what occurred in regard to the exchange of text-books. There were three of these articles. One was published the week before, one on the same day of, and the other a week after the publication made by the appellant. These articles were offered in evidence by the appellant, but upon objection by the State they were not admitted. It is claimed that there was

Hartford v. State.

a discrepancy between some of the statements made in those publications and the evidence of the prosecuting witness at the trial. Whether there was or not such contradiction we express no opinion, but as the articles related to the same facts testified to by the prosecuting witness, the appellant, we think, had the right to put these articles in evidence, leaving the jury to determine whether there were any contradictions that in any way affected the credibility of the witness. The first article reflected severely upon the appellant, charging him with falsehood in circulating reports injurious to the county superintendent regarding his conduct in procuring the exchange of text-books. There was evidence tending to show that the appellant's publication, which he claimed was "a true statement of the facts in the case," was provoked by the publication of the first article by the prosecuting witness. Even though this publication by the prosecuting witness was libellous, it furnished no excuse or justification for that made by the appellant. The commission of one crime can be no defense for the commission of another. At the same time however the law is well settled that in civil actions for libel the defendant may, in mitigation of damages, show that the publication complained of was provoked by one, relating to the same subject, made by the plaintiff a short time prior to the defendant's publication. Towns. Sland. and Libel, §§ 414, 415, 416; Odgers Libel and Sland. 306; 4 Wait Act. and Def. 313. We think that the same rule should apply in criminal cases, and that the first article published by the prosecuting witness should have been admitted in evidence as proper to be considered by the jury in mitigation of punishment. Circumstances of a mitigating character, and which are proper to be considered by the jury in fixing the penalty, may be introduced in evidence by the defendant in a criminal case. *Kistler v. State*, 54 Ind. 400; 1 Bish. Crim. Law, §§ 948, 949. As the jury in the present case did not assess the lowest penalty prescribed by statute for the offense of libel, we cannot say that the exclusion of the evidence offered by the appellant was harmless.

[Other matters omitted.]

There was error in overruling the appellant's motion for a new trial.

Judgment reversed, with instructions to the court below to sustain the appellant's motion for a new trial.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

HART v. STATE.

(15 Tex. Ct. App. 202.)

Criminal law — murder — evidence — clothes of deceased.

On a trial for murder by shooting, the clothes worn by the deceased, with the shot holes in them, may be exhibited to the jury in evidence. (*See note, p. 191.*)

CONVICTION of murder. The opinion states the point.

E. W. Terhune, Perkins, Gilbert & Perkins, and Updegrove & Hefner, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. [Omitting other points.] As shown by the seventh bill of exceptions, the State was permitted to produce and identify before the jury the clothing worn and the buggy rug used by the deceased at the time he was shot, which were perforated by bullet holes. Objection was made, and sustained as far as it was proposed to offer the articles of clothing and rug as

Hart v. State.

evidence in themselves, but was overruled in other respects, and the witness was permitted to identify the articles; to state that they were the clothing and rug worn and used by deceased on the day and at the time of the shooting, and to exhibit to the jury in what part of each of the articles the bullets had penetrated, and in which the holes were to be seen. Several objections were and are urged to this testimony, the principal ones being: "Because such testimony cannot be made a part of the record herein, and is not of such a character as can be incorporated in the record for the Court of Appeals," and "Because it proved nothing, but was calculated to prejudice the jury, and was in their minds evidence put before them, that they as men could not easily discard." These objections are almost invariably urged whenever the State seeks to avail itself of this character of evidence, and doubtless they spring from certain *dicta* to be found in *Smith v. State*, 42 Tex. 448. Is it true, or is it a standard test or even a test at all, that the legality and admissibility of evidence depends upon the fact that it must be such as can and must be incorporated into and brought up with the record? We know of no such rule announced by any standard work on the law of evidence. If it be true, then the identification, the pointing out of a defendant in court, is not legitimate or admissible, because "he cannot be sent up here with the record." A witness's countenance, tone of voice, mode and manner of expression, and general demeanor on the stand oftentimes influence the jury as much in estimating the weight they give and attach to his testimony as the words he utters, and "yet they cannot be sent up with the record," though they are fit subjects to be observed by the jury in connection with his testimony, and it is their duty to consider them in passing upon his testimony. How they have impressed the jury and influenced their verdict are facts known only to themselves, facts which must necessarily be unknown to the defendant, to the trial court, and to this court, save as they may be manifested in the verdict, because they cannot be written in the record; and yet they are and always have been the best and most legitimate sources from which a correct estimate of the value of oral evidence is drawn. Our own rules do not require that such matters of proof be incorporated into the statement of facts. See Rules for District Courts, 71 *et seq.* A juror, to be competent and fit for jury service, should not be defective in the organs of seeing any more than in his organs of feeling or hearing (Code Crim. Proc., art. 636, sub-div. 5), and

he often sees, and rightly sees and acts upon, many things "which cannot be incorporated in the record." "Evidence includes the reproduction before the determining tribunal of facts either notorious or verified in open court, * * * and when not matter of notoriety, recognized as such by the court, is adduced only by the parties through witnesses, documents or inspection." Whart. Crim. Ev., § 3. Whilst it is true "that no matter of fact, that is to say, no actual phenomenon of external nature, can in any possible state of human knowledge be a matter of demonstration," it is none the less true that the nearer we approximate demonstration by evidence the better and more satisfactory and convincing that evidence is to the human mind. The doubting Thomas of scripture could not be made to believe that the resurrected Saviour was indeed the dead and crucified Jesus, until permitted to put his fingers into the nail holes shown in the holy hands, and thrust his own hand into the wounded side whence the spear of the Roman soldier let out the life blood of the dying Lord.

In a recent case in England, not at present accessible, the defendant was on trial for selling grain by a false measure. To solve the question of his guilt the court had the supposed false measure and a standard measure brought before the jury, and the grain actually measured from the one into the other in the presence of the jury. Will any one pretend to say that this was not the best and most satisfactory evidence to the minds of the jury which could possibly be adduced of the fact in issue before them? And could not the fact be sufficiently stated in the record so as to apprise this court fully of the nature and character of the evidence and mode of proof upon which the verdict was founded? Clearly so, we think.

In a recent case in Georgia it was held that a pistol used in the commission of a homicide could be and was properly submitted to the jury for inspection. *Wynne v. State*, 56 Ga. 113.

Mr. Wharton, in his work on Homicide, says: "Dress, independently of the questions to be hereafter noticed, adds often an important element of indicatory proof. Thus in a case cited by Taylor there were two cuts in a shirt produced in evidence. These cuts were near each other and precisely similar, leading to the inference that the knife producing them went through two folds of the shirt. From this however it followed that the shirt could not have been on the deceased at the time of the wounding, since if it had been there would have been three, not two cuts. So on the

Hart v. State.

trial of Stokes for the murder of Fisk in 1873, the condition of the deceased's cloak immediately after the wound was admitted to show the force and direction of the shot. Nor is it necessary, it has been ruled, that the garments in question should be themselves produced. Their condition can be described by witnesses without such production, if their non-production is satisfactorily explained. But if practicable, they should be secured and brought into court, though before admitting them there should be evidence that they have not been tampered with since the killing." Whart. on Homicide (2d ed.), § 674.

But the identical question before us came up in the case of *King v. State*, 13 Tex. Ct. App. 277, and it was said: "Upon the trial of this case the State, over defendant's objection, was permitted to introduce and exhibit to the jury a coat and pair of pants which were proved to have been on the person of deceased at the time he was shot. Testimony of this character is oftentimes pertinent, material and admissible. *Hubby v. State*, 8 Tex. Ct. App. 597; *Early v. State*, 9 id. 485." See also White & Wilson's Tex. Dig., § 1307.

In the light of these authorities the clothing and buggy rug of Skinner would have been perfectly legitimate and admissible as evidence before the jury, though they could not have been incorporated into the record, and though it might have been impossible for us to know here, beyond their verdict, to what extent they influenced or affected the jury. If legitimate and competent evidence, the State had the right to introduce them, no matter how the jury might be affected by them.

[Other matters omitted. But on another point]

Reversed and remanded.

NOTE BY THE REPORTER.—*Practical Tests and Experiments in Evidence.* As to photographs, etc., see note, 26 Am. Rep. 819; *Cowley v. People*, 88 N. Y. 464; 88 Am. Rep. 464, and note, 474.

As to exhibition of a child in court on the question of parentage, see *People v. Carney*, 29 Hun, 47; *State v. Smith*, 54 Iowa, 104; s. c., 87 Am. Rep. 192; *State v. Danforth*, 48 Iowa, 48; s. c., 80 Am. Rep. 887; *Pettie v. Howe*, 4 Thomp. & Cook, 85. See also *Ihinger v. State*, 58 Ind. 251.

As to compelling a prisoner to furnish evidence of his identity by putting his foot in a track or exposing his person, see *State v. Graham*, 74 N. C. 646; s. c., 21 Am. Rep. 498; *Walker v. State*, 7 Tex. Ct. App. 245; s. c., 82 Am. Rep. 595; *Stokes v. State*, 5 Baxt. 619; s. c., 82 Am. Rep. 595; *State v. Sanders*, 68 Mo. 202; s. c., 80 Am. Rep. 782; *State v. Garrett*, 71 N. C. 85; s. c., 17 Am. Rep. 1; *State v. Ah Chuey*, 14 Nev. 79; s. c., 83 Am. Rep. 580;

Hart v. State.

Blackwell v. State, 67 Ga. 76 : s. c., 44 Am. Rep. 717 ; *Campbell v. State*, 55 Ala. 80.

As to compelling a person suing for personal injuries, to submit to a physical examination, see *Schroeder v. C. R. I. & P. R. Co.*, 47 Iowa, 375 ; *Roberts v. Ogdensburgh, etc., R. Co.*, 29 Hun, 154 ; *White v. Milwaukee City R. Co.*, Wisconsin Supreme Court, 29 Cent. L. J. 11.

On a question of the quality of singing, witnesses were allowed to imitate the singing in question. *State v. Linkham*, 69 N. C. 214 . s. c., 12 Am. Rep. 645.

On a murder trial the bones of the deceased may be exhibited in court to explain the relative attitude and position of deceased and defendant at the time. *State v. Wiemers*, 66 Mo. 18.

In a case of homicide, the jury were permitted to inspect the horse on which the deceased was riding at the time he received his death wounds, and to make experiments with a view of ascertaining whether the wounds could have been inflicted by a man standing on the ground. *Dillard v. State*, 58 Miss. 368.

On the trial of an indictment for rape, charged to have been committed in a wheat field, the woman having testified that the defendant had dragged her over the fence, evidence of experiments made in attempting to lift girls over this fence offered in contradiction was excluded. *Ulrich v. People*, 39 Mich. 245.

But evidence of experiments by shooting at short range with the pistol in question at substances like the clothing worn by the deceased when killed, was admitted in *Sullivan v. Commonwealth*, 93 Penn. St. 284.

In an action on a life insurance policy, the insurers asking for the exhumation of the body in order to show that the insured had suffered a fracture of the skull. It was intimated the request would have been granted if made within a reasonable time. *Grangers' Life Ins. Co. v. Brown*, 57 Miss. 308 ; s. c., 84 Am. Rep. 446.

Where a cashier undertook to identify a masked burglar by his voice, it was held incompetent for the defendant, not under oath, to prove what was his usual and natural voice by using his voice in the court room. *Com. v. Scott*, 123 Mass. 222 ; s. c., 25 Am. Rep. 81.

On a question of handwriting, the defendant may not write in court and submit the writing to the jury for comparison. *Com. v. Allen*, 128 Mass. 46 ; s. c. 85 Am. Rep. 356.

On the question whether in a photograph of several persons, sitting in a row, the outer images would be as vivid and correct as those in the center, the Supreme Court of the United States caused themselves to be photographed on the bench in open court.

In *Evarts v. Middlebury*, 53 Vt. 626, on a question of horse-shoeing, the shoes were allowed to be exhibited.

On the trial of an indictment for carrying on a boxing match, it was held not to be error to rule out the gloves offered in evidence. *State v. Burnham*, 56 Vt. 445 : s. c., 48 Am. Rep. 801.

In *Innis v. State*, 42 Ga. 477, a witness having testified that he committed

Hart v State.

to memory part of the play of Punch and Judy while certain facts, to which he had sworn, were occurring, the court allowed counsel on cross-examination to require him to repeat the dialogue referred to.

In the recent English case of *Belt v. Lawes*, the plaintiff, a sculptor, sued the *Vanity Fair* newspaper for libel in alleging that he is no artist, and that his pretended works are made by talented subordinates. The *Law Times* says: "This case is probably the first in which it has been suggested that an artist whose skill is impugned should prove it by practical operations in court. The inconvenient results which would probably flow from such a practice are obvious. The practical operation would not be recorded, although it might produce different impressions upon different minds. The operator and his friends might consider the test conclusive in his favor; another view might be taken by the other side. How move against a verdict based on this operation on the ground that it was against the weight of the evidence? If the test is to be applied to a sculptor, why not to a *prima donna*? We have known of a case in which an *artiste* sought damages for wrongful dismissal, and the justification was that she could not sing. Would a judge have allowed her to sing to the jury? If so, the rule might be extended without limit, with consequences terrible to contemplate." The "suggestion" in the case in question came from the plaintiff on cross-examination, with the observation, "that will end the case." Hereupon the following dialogue ensued: "Mr. RUSSELL—No, indeed, Mr. Belt, it will not. Baron HUDDLESTON—If the jury express a wish to see Mr. Belt put to the test, I shall certainly not prevent it. (Applause in court, which was at once checked.) Sir H. GIFFARD—I shall certainly ask for it, my lord. Mr. RUSSELL—And I shall not object at the proper stage of these proceedings."

Subsequently, at Carnarvon, in an action for personal injuries against a railway company, the plaintiff's counsel asked him to allow the plaintiff to walk across the court before the jury, with a view to convince them that his lameness was not assumed. The same learned judge declined to allow this test, and said "that ever since he had been reported to have said, during the hearing of the case of *Belt v. Lawes*, that he should allow the plaintiff to make a bust of himself (Baron Huddleston) in court, he had been pestered to allow all kinds of tests to be gone through in court before the jury; and he wished it to be known that the press had entirely misrepresented him in this matter, and that he had never indicated that he should allow such a course to be taken." The difference between this test of skill and the offer in the railway case is manifest, for the jury could not tell but that the plaintiff then was shamming lameness, while there could be no question if he made a bust.

The *London Law Journal* says: "The practice of experimenting before judges is likely to receive a check, if it is often followed by such results as happened in a case before Mr. Justice PEARSON last week. Two German firms were disputing the exclusive right in certain patents for improvements 'in the production of coloring matters suitable for dyeing and printing.' The contention of the defendants was that the chemical means described in the specifications were impossible, because if the 'oxyazo naphthalinoine' were to be united with the 'fuming sulphuric acid' of the strength therein described, it

Schultz v. State.

would be dangerous to human life ; and an experiment *coram judice* was proposed. In an unguarded moment the judge consented, and adjourned in an empty room, where the baleful mixture was concocted by adding a teaspoonful of the unpronounceable liquid to an ounce of fuming sulphuric acid. The result was terrific. 'So dense and poisonous' were the effects of the fumes which arose, that judge, counsel, witnesses and bystanders fled, 'with the utmost precipitancy, to avoid being asphyxiated on the spot' Her majesty's judges are brave men, but even in the search for truth they ought not to be exposed to dangers hitherto reserved for combatants in China ; and the smoking out of the Royal Courts of Justice, as if it were a nest of hornets, is a contempt of court for which none of the penalties provided by the Lord Chancellor's Bill is adequate." The London *Law Times* says of the same transaction : "We see no advantage in this kind of exhibition, the conditions under which such an experiment has to be made must tend to make it misleading, and a court should be, as a by-gone judge described it, 'a machine put in motion by evidence' of witnesses, not by the exhibition of experiments."

Lumb v. Beaumont, 82 W. R. 985, was brought to restrain the defendants, who were the owners of a house fronting on the same street as a house owned by the plaintiff, from causing or permitting any sewerage to be discharged from their premises into a drain belonging to the plaintiff, and from continuing or permitting to remain any connection between their premises and the plaintiff's drain ; and the court, upon the application of the plaintiff, made an order authorizing him to enter upon that part of the street, the soil of which belonged to the defendants, for the purpose of experimenting, in order to discover whether the pipe which joined the plaintiff's drain proceeded directly from the defendant's house, and for that purpose to dig up the street so far as might be necessary.

See Browne's "Humorous Phases of the Law,"—"Practical Tests in Evidence."

SCHULTZ V. STATE.

(15 Tex. Ct. App. 282.)

Criminal law — lost indictment.

When an indictment is lost after plea the trial may proceed on a copy.

CONVICTION of theft. The opinion states the point.

Harvey & Browne, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. It appears from the record that the indictment was read to the jury on the trial, the defendant having entered a plea of not guilty thereto. When the jury returned their verdict into court, the indictment was missing. It was shown by the affidavits of the clerk of the court and of the prosecuting attorney, that when the jury retired to consider of their verdict, the indictment was handed by the clerk to the foreman of the jury. It was, on the other hand, shown by the affidavits of the foreman and two other members of the jury that the indictment was not before the jury when the case was being considered by them, nor when they made up their verdict. The verdict was written upon a bail bond, which was a paper in the cause.

When the loss of the indictment was ascertained the district attorney suggested its loss to the court and moved to substitute it, which motion was granted and the indictment was substituted. A motion in arrest of judgment was made by the defendant and overruled by the court ; which motion was based upon the ground that there was no indictment before the jury or in court at the time the verdict was made and returned into court. The court then proceeded to enter judgment upon the verdict, and after motion for new trial made and overruled and after the court had pronounced the sentence upon the defendant he appealed to this court.

It is argued by the defendant's counsel that article 434 of the Code of Civil Procedure, providing for the substitution of an indictment, is violative of the Fourteenth Amendment to the Constitution of the United States, and also of article 1, section 10, of our Bill of Rights. This article of our Code was not contained in the original Code but was engrafted thereupon by amendment, by act of February 15, 1858. Prior to the adoption of the original Code we had a statute however which provided for the substitution of a lost indictment, though it was not so full and explicit in prescribing the manner and requisites of such substitution as is article 434 before cited, and did not permit the substitution to be made except by the grand jury. Hartley's Digest, art. 464 ; *State v. Elliott*, 14 Tex. 423. But in *State v. Adams*, 17 id. 232, it was held that an indictment might be substituted under the statute providing for the substitution of lost records in civil cases. Pas. Dig., arts. 4969, 4970. That was a case where the indictment was for a misdemeanor, and no question was raised as to the constitutionality of the law with reference to indictments. In *State v. Ivy*, 33

Tex. 646, which was also a prosecution for a misdemeanor, it was held that it was proper to substitute an indictment and that the substitution need not be made by the grand jury presenting another indictment, but might be made by the district attorney. There was no question raised in Ivy's case as to the constitutionality of the statute.

We have examined all the cases decided in our own State wherein the question of substitution or attempted substitution of the indictment has been before the court and in none of them do we find the question of the constitutionality of this statute, in so far as it allows the substitution otherwise than by the act of the grand jury, presented or discussed. *Turner v. State*, 7 Tex. Ct. App. 596; *Beardall v. State*, 9 id. 262; *Rogers v. State*, 11 id. 608. It is therefore an open question in this State and in the opinion of the writer is by no means free from difficulty.

By section 10 of our Bill of Rights no person shall be held to answer for a criminal offense which is a felony, unless on indictment of a grand jury. Is a paper which has been substituted for the indictment by the act of the district or county attorney, in the manner provided by the statute, an indictment of a grand jury? If it is not, then is it within the power of the legislature to provide that any person shall be held to answer for a felony upon it? But we are not called upon by the facts in this case to determine the question as to the constitutionality of the statute referred to, and we have adverted to it mainly for the purpose of calling the attention of prosecuting attorneys to the subject and suggesting to them that it is much the safer and better practice, wherever it can be done, to substitute a lost indictment by having another one returned by the grand jury; which was the common-law practice, and is the only mode of supplying a lost indictment in most of the States. 1 Bish. Crim. Proc., § 1400.

In the case before us the defendant was called upon to answer the original indictment, which was the act of the grand jury, and he pleaded to it as such, thereby admitting its genuineness. He was put upon his trial therefore "on indictment of a grand jury," in compliance with the requirement of our Bill of Rights, and upon "due process of law," as required by section 1 of the fourteenth amendment to the Constitution of the United States. It was not until after the defendant had pleaded to the indictment that it was lost and substituted. This being the case the constitutional ques-

Schultz v. State.

tions raised by defendant's counsel are not properly in the case. We find these questions ably discussed in two Alabama cases, where the difference between the substitution of a lost indictment before trial and its substitution after plea to the merits is clearly pointed out.

In the first case, *Ganaway v. State*, 22 Ala. 772, an indictment was substituted before trial, by a proved copy thereof. The court said: "The question here is, can an indictment be substituted before trial. * * * The power of substitution is claimed as a power inherent in every court to supply such papers, or parts of the record, as may have been lost by accident or destroyed, which constitute a necessary part of the proceedings.

* * * But this power does not embrace an indictment. The court has no power to make an indictment, or to direct one to be made. That power resides exclusively with the grand jury. * * * In the matter of preferring an indictment the grand jury are the sole judges, under their oath, of the propriety of their own action. * * * The right is conceded to the prisoner to be arraigned on the indictment found by the grand jury; to have an inspection of that identical paper, in order to make his objections to its form or substance, if any exist. The rule is one which tends to make solicitors careful in drawing indictments, with reference to the question we are discussing, and clerks extremely careful of their safe custody. We doubt whether on the whole, any good would be accomplished by overthrowing a rule which is productive of these consequences. When an indictment is lost or destroyed, it can generally be supplied by having a new one found by the grand jury." Accordingly, the court in that case held that the indictment could not be substituted.

In *Bradford v. State*, 54 Ala. 230, the indictment was lost after the trial had commenced, and after the defendant's plea of not guilty thereto had been entered, and upon discovering the loss of the indictment it was substituted, pending the trial of the case. *Bradford's* case being a parallel case to the one before us, with reference to the question we are discussing, we shall extract from the able opinion of Chief Justice BRICKELL at length. The opinion says: "Courts of record, independent of express legislation, have power to substitute any of the files or records which may be lost or destroyed. The power is matter of necessity, whether the loss oc-

curs while the cause is *in fieri*, before it has progressed to final judgment, or after such judgment has been rendered, and whether the loss is of the whole record, or of papers which, when it is finally made up, will constitute a part of it. In reference to civil cases, the statute now provides, 'if an original pleading be lost, or withheld by any person, the court may order a copy to be filed in place of the original.'

"In *Ganaway v. State*, 22 Ala. 772, the majority of the court, recognizing this power of the court in civil cases, denied the power to substitute an indictment before arraignment and trial. Since the statutes provide that if an indictment is lost, mislaid or destroyed, the court may on satisfactory proof thereof order another indictment to be preferred. And further provides the time elapsing between the finding of the first and the subsequent indictment shall not be computed as part of the time limiting the prosecution of the offense. Neither the decision in *Ganaway's* case nor the statute meets the question now presented — the loss of an indictment, the verity of which was indisputable. The opportunity of inspecting it had been afforded, and availing himself of the opportunity, he tested by demurrer its sufficiency. The demurrer being overruled, the plea of not guilty — he declining to plead — was entered for him before the loss of the indictment. There can be no apprehension that an indictment against him had not been preferred by the grand jury, or that he was put on his trial to answer the genuine finding of the grand jury. The indictment having been lost after plea, after the jury had been impanelled and the evidence closed, the result is, the prisoner was entitled to his discharge, if the continuous existence and presence in court of the indictment was essential, and the court could not by substitution supply its loss * * * * *

"Without infringing on the decision in *Ganaway's* case, or invoking the aid of the statute, as matter of legal principle, jealous of the safety of the accused and preservation of all the rights guaranteed to him, we cannot apprehend there is any real difficulty in affirming the power of the court to permit or indeed to compel the substitution of the indictment, under the facts found in the record, with or without the consent of the accused. The indictment under our laws is an indispensable constituent of the record. To answer it the defendant is arraigned, and to it his plea is the answer, whether he voluntarily

Schultz v. State.

interposes it, or the court, when he stands mute, intervenes for him. Before he can be arraigned and put on his trial the record must disclose an indictment, that it is the finding of a grand jury, organized in the mode prescribed by law, and by them returned into and accepted by the court. * * * When pleaded to, either by the plea of not guilty or by general demurrer because of its insufficiency in law, its genuineness as a record stands admitted. Neither plea would be proper or authorize the rendition of judgment unless interposed to a genuine indictment. * * *

“Of the existence of the original indictment, and of its verity, there could be and was no controversy. The substitution was the introduction into the record of matter previously recognized by the court, and admitted by the defendant of matter the verity of which had previously passed beyond controversy. It was the duty of the court to make the record speak the truth ; to conform it to the facts as they existed when the defendant was arraigned, pleaded and was put on his trial; thereby no right of the accused was imperiled ; he is not subjected to any other jeopardy than that in which he was placed when put on his trial. That the grand jury had made a presentation against him ; that it was returned into court ; that he had admitted its verity, was already judicially ascertained, and was apparent of record. His clear, constitutional right was to a verdict from the jury impanelled and sworn, which he had accepted as his triers. The loss or destruction of the indictment could not take away this right. The State had a corresponding right that the trial should progress, and a judgment of conviction or acquittal be rendered, finally determining the prosecution. Such rights cannot be impaired or destroyed by the accidental loss or the willful abstraction or destruction of papers pending the trial. The substitution of such papers on satisfactory proof by the court is the only mode of supplying the loss, and lies within the inherent power of the court. Otherwise the progress of a cause could be arrested ; the escape of the criminal could be secured by the felonious abstraction, or the accidental loss of the indictment. In *Ganaway's* case, and in the case provided for by the statute, the loss may be supplied by preferring a new indictment, and that, when it can be pursued, is the more conservative practice, if the statute had not directed it. But when pending the trial the indictment is lost or destroyed, the defendant being in jeopardy, the result is his discharge, or it must rest in the power of the court to supply the loss by substitution.

Rights, neither of the State nor of individuals, are lost by the loss of records or the constituents of a record in the custody of courts or public officers. We are of opinion the court had power, without the consent of the accused, or of his counsel, to order the substitution."

If the opinion from which we have so largely copied announces the correct practice, it is as applicable here as in Alabama; and when applied to the case in hand, is authority in point for sustaining the action of the court in substituting the indictment. We think the reasoning of Chief Justice BRICKELL in *Bradford's* case is sound and unanswerable, and in so far as that case holds that the indictment may be substituted after the defendant has pleaded to it, we fully indorse it. We hold therefore in the case before us that the court did not err in permitting the lost indictment to be substituted.

[Minor matters omitted.]

Judgment affirmed.

TEMPLE V. STATE.

(15 Tex. Ct. App. 204.)

Evidence — judicial notice.

Where every locality of two hundred inhabitants may incorporate itself as a town, the courts will not take judicial notice of such incorporation. (*See note, p. 201.*)

CONVICTION of manslaughter. The opinion states the case.

Frank Templeton, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. [Omitting other matters.] It was objected that parol evidence was admitted to prove that the town of Jacksonville was an incorporated town, and that the deceased was, at the time he was killed, the marshal of said town. In some of the States, Alabama for instance, the rule is that "courts will judicially notice

Temple v. State.

the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute but when it is public and general in its nature or purposes, though there be no express provision to that effect." 1 Dill. Mun. Corp. (3d ed.), § 83. Such is not the rule in this State. With us a district judge is not charged with notice or judicial knowledge that any designated locality is an incorporated town or city. *Patterson v. State*, 12 Tex. Ct. App. 222.

And the reason for the rule as it obtains with us may be found in provisions of our law with regard to municipal corporations and the mode and manner of their creation. No special legislative act is required to create or legalize such corporations. Any town of two hundred inhabitants or any city may of itself become incorporated by complying with the general laws upon the subject. Rev. Stats., arts. 340 to 541, inclusive; acts 17 Legislature, pp. 63, 115, 116, 117. After an election has been held under the general laws, and "corporation" is carried, all that is necessary to invest the town with all the rights incident to corporations under the law is that the county judge "shall, within twenty days after the receipt of the returns, make an entry upon the records of the Commissioners' Court that the inhabitants of the town are incorporated," etc. Rev. Stats., arts. 511 to 514. It could scarcely be expected that the courts should judicially know of all such, and when they have been made and placed on the records of the County Commissioners' Court.

[But on another point]

Reversed and remanded.

NOTE BY THE REPORTER.—*What will be noticed judicially.* See 87 Am. Dec. 84; 10 Abb. N. C. 107, note; Moak's Van S. Pleading, 254; *Brown v. Piper*, 91 U. S. 87. Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction. *People v. Snyder*, 41 N. Y. 397. Of the Constitution of a sister State, so far as the jurisdiction of its courts is shown. *Dodge v. Coffin*, 15 Kans. 277. For the purpose of construing a Constitution or statute, courts may take judicial notice of every thing which may affect the validity or meaning of such Constitution or statute. *City of Topeka v. Gillett*, 32 Kans. 481. Of the civil divisions of the State. *Chapman v. Wilber*, 6 Hill, 475; *People v. Breece*, 7 Cow. 429; *Gooding v. Morgan*, 70 Ill. 275. The result of an election on the question of the removal of a county seat, as a fact connected with the organization of counties, where the question is drawn in issue collaterally. *Andrews v. Knox Co.*, 70 Ill. 65. Boundaries of the several judicial districts in the city of New York. *People*

Temple v. State.

v. *Callahan*, 60 How. 873. Acts creating municipal corporations. *Winoski v. Gokoy*, 49 Vt. 282; *Stier v. City of Oskaloosa*, 41 Iowa, 853; *Bowie v. City of Kansas*, 51 Mo. 454; *Prell v. McDonald*, 12 Am. Rep. 423; *State v. Tosney*, 26 Minn. 262. So of the repeal of a section of an act incorporating a town. *Belmont v. Morrill*, 69 Me. 814. Where a public law creates the mayor and aldermen an incorporated body, no averment or proof is necessary to establish the existence of the corporation *State v Mayor, etc.*, 11 Humph. 217. When it is shown that a town or city has availed itself of the general law authorizing towns and cities to become incorporated, the courts will take judicial notice of the rights and powers conferred thereby. *City of Hopkins v. Kansas, etc., R. Co.*, 79 Mo. 98.

In *Hard v. City of Decorah*, 43 Iowa, 813, DAY, J., said: "Where a town or city is incorporated by special act of the legislature, the statute partakes of the nature of a public act, and courts take judicial notice of it. *People v. Potter*, 35 Cal. 110; *Swails v. State*, 4 Ind. 516, *Vance v. Farmers & Mechanics' Bank*, 1 Blackf. 79; *State v. Mayor and Aldermen of Murfreesboro*, 11 Humph. 217; *Case v. Mayor of Mobile*, 30 Ala. 538; *West v Blake*, 4 Blackf. 234; *Pull v. McDonald*, 7 Kans. 426; *Beatty v. Knowles*, 4 Peters, 152." Where an action for the violation of a city ordinance is commenced and prosecuted to conviction and sentence before the police judge of such city, and the case is then taken by the defendant on appeal to the District Court, the District Court should, with reference to such case, take judicial notice of the incorporation of such city and of the existence and substance of its ordinances. *City of Solomon v. Hughes*, 24 Kans. 211. That a certain city is in a certain county. *Clayton v. May*, 67 Ga. 769; *Solyer v. Romanet*, 52 Tex. 562; *Ala. Gold Life Ins. Co. v. Cobb*, 57 Ala. 547. But see *Hoffman v. State*, 12 Tex. App. 406.

Where the articles of a turnpike association state the termini of the road to be within a certain county, the courts of this State will take notice that a road running from one of such termini to the other is located wholly in such county. *Steinmetz v. Versailles, etc., Turnpike Co.*, 57 Ind. 457. Of the population of cities within the State. *Matter of Jacobs*, 2 N. Y. Crim. Rep. 356. Of the distance between well known cities in the United States, and of the ordinary speed of railway trains between the same. *Pearce v. Langfit*, 47 Am. Rep. 737. But see *Rice v. Montgomery*, 4 Biss. 75. Who the executive may be at any time the fact may be called in question. *Dewes v. Col. Co.*, 32 Tex. 570. All public officers who are commissioned by the governor, and are bound to recognize their official acts. *Beggs v. State*, 55 Ala. 108. Of the civil officers of a county. *Thielman v Burg*, 73 Ill. 283; *Himmelman v. Hoadley*, 44 Cal. 218. That aldermen are public officers. *Hibbs v Blair*, 2 Harris, 413; *Goddard v. Glominger*, 5 Watts, 219. *Fox v. Com.*, 81 *Penn. St. 516. That one is an attorney. *People v. Nevins*, 1 Hill, 154. Of the streets of San Francisco and of their relation to each other and of the direction in which they run. *Brady v. Page*, 59 Cal. 301. But not of the width of streets or sidewalks. *Porter v. Waring*, 69 N. Y. 250. That sewers in the city of New York are incidents to and generally found in the streets, for the purpose of construing an act regulating grading, etc., a street to include the power to construct a sewer. *Matter of L & W. Orphan Home*, 92 N. Y. 116; Abb.

Temple v. State.

Ann. Dig. (1882-3), 155. That the island of Cuba is a dependency of the kingdom of Spain. *People v. D'Argencour*, 82 Hun, 178.

In *Lazier v. Westcott*, 26 N. Y. 148, it was held that the "court would take judicial notice that the province of Upper Canada is a foreign country and forms no part of our own, *Ennis v. Smith*, 14 How. (U. S.) 430, and that it has a government and courts, and that those courts proceed according to the course of the common law. A general law authorizing a particular class of corporations. *Methodist, etc., v. Pickett*, 19 N. Y. 486. A railroad charter, published by the State among the public and private acts and resolutions of the legislature, as required by statute. *Hall v. Brown*, 60 N. H. 93; *Baltimore, etc., v. Sherman*, 30 Gratt. 602.

Courts and juries from their general information may take the initials C. O. D., when affixed to packages sent by common carriers from seller to buyer, to mean that a delivery is to be made upon payment of the charges due the seller for the price, and the carrier for the carriage of the goods. *State v. Moffit*, 73 Me. 278. The court said: "What can be established by indisputable proof may be acknowledged without proof. What is notorious needs no proof. 1 Whart. Ev. § 330; Best Ev. 351." That as a general rule, trains running upon a railroad are run, directed and controlled by the owners of the road. *South, etc., R. Co. v. Pilgreen*, 62 Ala. 805; *Evansville, etc., v. Smith*, 65 Ind. 92. All the laws of the State; and in doing so, of what the books of published laws contain, of what the enrolled bills contain, of what the legislative journals contain, and indeed of every thing that is allowed to affect the validity or meaning of any law in any respect whatever. *Division of Howard Co.*, 15 Kans. 194; *Moody v. State*, 48 Ala. 115.

In *Paine v. Schenectady Insurance Co.*, 11 R. I. 411, it was held, that "in legal proceedings in Rhode Island, when the judgment of a court of a sister State is impleaded, the Rhode Island court will take judicial cognizance of the laws of such State." DUFFEE, C. J., said: "The first question is, whether we can take judicial cognizance of the law of New York, or must presume it to be the same as ours until it is shown by averment and proof to be different. The decisions upon this point are conflicting, but we think the decision of the Supreme Court of Pennsylvania, in *State of Ohio v. Hinchman*, 27 Penn. St. 479, rests upon the better reason. The court there held that when the judgment impleaded is the judgment of a sister State, the court will notice *ex officio* the law of the State in which it was rendered. The reason given for this is, that in such a case the court acts under the Constitution and laws of the United States, which require that the judgment shall have in every State the same faith and credit which it has in the State where it was originally rendered. In such a case, it was said, the decision of the State court is re-examinable in the Supreme Court of the United States, which will without averment or proof take cognizance of the law of the State in which the record originates. 'It would be very imperfect and discordant administration,' it was further said, 'for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows, that in questions of this sort, we should take notice of the local laws of a sister State in the same manner the Supreme Court of the United

Temple v. State.

States would do on a writ of error to our judgment.' See also *Barley v. Linah*, 16 Penn. St. 241; *Rae v. Hulbert*, 17 Ill. 572, 578; *Butcher v. Bank of Brownsville*, 2 Kans. 70; 2 Am. Lead. Cas. 648, *et seq.* We think the reasoning is sound, and that it is not satisfactorily met by courts which adopt a different view *Rape v. Heaton*, 9 Wis. 328, 341." Of the days of the week on which particular days of the month fall, *Phila., etc., R. Co. v. Lehman*, 56 Md. 209; *McIntosh v. Lee*, 57 Iowa, 356. That a judgment appealed from was rendered on a day of general election. *Rice v. Mead*, 22 How. Pr. 445; *Ellis v. Redden*, 12 Kans. 306. Of the meaning of current phrases which everybody else understands. As that the "Beecher business," printed of a clergyman implies a charge of adultery. *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251. That whiskey is an intoxicating liquor, and therefore an indictment for the unlawful sale of "spirituous liquor, commonly called whiskey," is sufficient, without an averment that the whiskey sold was intoxicating liquor. *Schlicht v. State*, 56 Ind. 174; *Egan v. State*, 53 id. 162. That "beer" is intoxicating. *Briffit v. State*, 46 Am. Rep. 621; *State v. Jenkins*, 32 Kans. 477. That "lager beer," commonly used as a beverage throughout the country, is a malt liquor. *Watson v. State*, 55 Ala. 158; *State v. Goyette*, 11 R. I. 592. Of the meaning of the words "malt liquor," as used in a penal statute, and may in a proper case give its definition in charge to the jury; but it will also take judicial notice that "Webster's Unabridged Dictionary," is a standard authority as to the meaning of English words, and may permit his definition of those words to be given in evidence to the jury. *Adler v. State*, 55 Ala. 16. Of the general course of business in a community, including the universal practice of banks. *Merchants' Nat. Bk. v. Hall*, 83 N. Y. 338; s. c., 38 Am. Rep. 438; *Bronson v. Wiman*, 10 Barb. 406; affirmed, 8 N. Y. 182. So of the mercantile custom of mutual credits. *Cameron v. Blackman*, 39 Mich. 108. Present methods of doing business. *Gregory v. Wendell*, 39 Mich. 337. That the railroads of the country conduct inspections under a system which all persons so employed as to be interested are presumed to understand. *Smith v. Flint, etc., R. Co.*, 46 Mich. 258.

The system of checking baggage by railroad companies, and of the general practice in case of through passengers having tickets for an entire route over roads owned and operated by separate but connecting lines, for the first company to check the baggage to its final destination, and to deliver it at the end of the route to the next succeeding carrier, and so on until it reaches the possession of the last carrier. *Isaacson v. N. Y. Cent., etc., R. Co.*, 94 N. Y. 278; s. c., 46 Am. Rep. 142. Of the nature of the business and office of mercantile agencies. *Eaton v. Avery*, 83 N. Y. 31; s. c., 38 Am. Rep. 391; *Macullar v. McKinley*, 49 N. Y. Supr. 5. Of changes in the course of business and of new processes of practical utility in facilitating trade, and will consider such innovations in adjusting the rights of parties. *Wiggins Ferry Co. v. Chicago Ele. R. Co.*, 5 Mo. App. 347. That gold coin is no longer used as money but has become an article of merchandise and traffic. *United States v. American Gold Coin*, 1 Woolw. 217. The value of American gold and silver coin, and of "national currency" notes, being fixed by law, no proof of their value is necessary to sustain a conviction for their larceny. *Grant v. State*, 55 Ala. 201. Of the

Temple v. State.

course of the seasons and of husbandry, and that the use and occupation of a farm in this State during six months, including the whole of the cropping season of the year, is worth more than such use and occupation during the remainder of such year. *Ross v. Boswell*, 60 Ind. 235. That a mortgage made in January upon a cotton crop is upon a crop not yet in being. *Tomlinson v. Greenfield*, 31 Ark. 557. Of the existence of the civil war between the States. *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174; *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169. And that it terminated prior to June 1, 1865. *Turner v. Patton*, 49 Ala. 406. In determining whether a testamentary trustee acted in good faith, and with reasonable diligence and prudence, in the investment and use of trust funds during the late war, where the will imposed upon him the duty of making investments which would pay interest or dividends, the courts will take judicial notice of the disturbed condition of the country during that period, the scarcity of stocks and public securities, the fluctuating values of property of every kind, and the consequent difficulty of making safe and productive investments. *Foscutt v. Lyon*, 55 Ala. 440. Of Sherman's march to the sea. 44 Ga. 302; *Williams v. State*, 67 id. 260. That the United States were the proprietors of land granted by them to the State of Illinois, and that such grant was made, and of the location of such land. *Smith v. Stevens*, 82 Ill. 554. Congressional surveys of lands, under the various acts of Congress. *Murphy v. Hendricks*, 57 Ind. 593; *Gardner v. Eberhardt*, 82 Ill. 316. And also of blocks and lots in towns and cities, and where a debtor has a dwelling upon any forty-acre tract, or on any town or city lot, which, with the buildings thereon, clearly exceeds in value \$1,000, the law regards such forty acres or such town or city lot as "the lot of ground by him occupied as a residence," and his exemption is confined to such tract or lot, and the sheriff may levy on and sell any adjacent tract or lot without the intervention of a jury. *Gardner v. Eberhart*, 82 Ill. 316; *Gooding v. Morgan*, 70 id. 275. In construing and ascertaining the location and boundaries of an ancient French grant of lands, made more than one hundred and sixty years ago, the names of all the places and natural objects mentioned (except Fowl river) being now unknown, the court takes judicial notice of the general geography of the country about the mouth of that river, and also of the historical fact, stated by Bancroft and Pickett, that Dauphin island was anciently called Massacre island. *Trenier v. Stewart*, 55 Ala. 458.

In *People v. Snyder*, 41 N. Y. 397, it was held that, "The courts of this State will take judicial notice that the western portion of the territory of this State was by its own act ceded to the State of Massachusetts, and by the latter conveyed to certain parties, who afterward, under the proper authority of both States and of the nation, extinguished the title of the Indians to it." The bankrupt act and its operation. *Morris v. Davidson*, 47 Ga. 361; *Mims v. Swartz*, 37 Tex. 13. Of the statutes relating to internal revenue. *Kessel v. Alberts*, 56 Barb. 362; *Brown v. Piper*, 91 U. S. 37. That the territory of the United States is, for the purposes of internal revenue, divided into collection districts, with defined geographical boundaries. *United States v. Jackson*, 104 U. S. 41. The courts of the United States will take judicial notice of the public statutes of the several States. *Elwood v. Flannigan*, 104 U. S. 562;

Temple v. State.

Smith v. Tallapoosa Co., 2 Woods, 574. An act of the legislature which is declared to be a public act, and which expressly recognizes and amends a prior private law. *Lavalle v. People*, 6 Bradw. (Ill.) 157. Where the fact of navigability of a stream is generally known, the court may take judicial notice thereof. *Ross v. Faust*, 23 Am. Rep. 655; *Wood v. Fowler*, 40 id. 330. That a box freight car standing at a railway and highway crossing will not frighten horses of ordinary gentleness. *Gilbert v. Flint, etc., R. Co.*, 47 Am. Rep. 592. The art of photography. *Lake v. Calhoun*, 52 Ala. 115. The Northampton tables. *Davis v. Standish*, 26 Hun, 608. The almanac. *People v. Chee Kee*, 61 Cal. 404.

What will not be noticed judicially. — A State court will not take judicial notice of proceedings in the Federal courts. *Haber v. Klauberg*, 3 Mo. App. 342. That the law of another State differs from our own. *Phenix Ins. Co. v. Church*, 81 N. Y. 218, 227-8; s. c., 37 Am. Rep. 494. The statutes of a sister State. *Hunt v. Johnson*, 4 Am. Rep. 631; *Holmes v. Broughton*, 10 Wend. 75; *State v. May Looke*, 7 Oreg. 54; *Roberts v. Marley*, 80 Ind. 185; *Neese v. Farmers' Ins. Co.*, 55 Iowa, 604; *Chapman v. Colley*, 47 Mich. 46; *Shed v. Augustine*, 14 Kans. 282. But see in *Tennessee* under the code. *Hobbs v. Memphis, etc., R. Co.*, 9 Heisk. 373. Nor of a foreign country. *Monroe v. Douglass*, 5 N. Y. 447. The law of France upon the subject of days of grace on commercial paper. *Dollfus v. Frosch*, 1 Den. 367. What are the rights and disabilities of infants, or when infancy ceases by the provincial law of Jamaica. *Thompson v. Ketcham*, 8 Johns. 189. Special or private acts. *Hailes v. State*, 9 Tex. App. 170; *Broad Street Hotel Co. v. Weaver*, 57 Ala. 26; *Atcheson, etc., R. Co. v. Blackshin*, 10 Kans. 477; *Workingmen's Bank v. Converse*, 33 La. Ann. 963. Local customs concerning water rights. *Lewis v. McClure*, 8 Oreg. 273. Those of mining districts. *Sullivan v. Henn*, 2 Col. 424. That a town is in a given county, unless there be a statute recognizing such location. *Boston v. State*, 32 Am. Rep. 575; *Hoffman v. State*, 12 Tex. App. 406. But see *Clayton v. May*, 67 Ga. 769. City ordinances. *City of New Orleans v. Labatt*, 33 La. Ann. 107; *Chicago, etc., R. Co. v. Klauber*, 9 Bradw. (Ill.) 613; *Porter v. Waring*, 69 N. Y. 250.

In *Town of Butler v. Robinson*, 75 Mo. 192, the court said: "Courts cannot take judicial cognizance of charters incorporating towns, as they may do of public statutes. 1 Greenl. Ev., §§ 479, 480. It is only where an act of incorporation is declared to be a public act that courts will judicially notice it, as they will statutes of a public nature. *Bowie v. Kansas City*, 51 Mo. 454."

That a particular town or city has availed itself of the privileges of a general act of incorporation. *City of Hopkins v. Kansas, etc., R. Co.*, 79 Mo. 98. Orders issued by a commander in the exercise of military authority. *Burke v. Mittenberger*, 19 Wall. 519. A bank charter. *First Nat. Bk., etc., v. Gruber*, 30 Am. Rep. 378; *Maudie v. Bousignore, etc., Savings Bank*, 28 La. Ann. 415. *Contra*, *Terry v. Merchants, etc., Bank*, 66 Ga. 177. That a bank located in a sister State is insolvent. *Market Nat. Bank v. Pacific Nat. Bank*. Corporate regulations. *Harker v. Mayor, etc.*, 17 Wend. 199. Unless they are rules or usages of trade and commerce which would be recognized without their adoption by any particular board or association. *Goldsmith v. Sawyer*,

Alonzo v. State.

46 Cal. 209. Of general organization and administration of the Methodist Episcopal Church. *Sarahass v. Armstrong*, 16 Kans. 192. The character of a small stream not found on the general maps of the State, nor in any general history of the country, nor defined in any public statute. *People v. Allen*, 42 N. Y. 378. Whether land located under scrip is in a lake which is a navigable body of water and hence not subject to location. *Wilcox v. Jackson*, Ill. 261. A railroad charter. *Perry v. N. O. R. Co.*, 55 Ala. 414. That a railroad company, in locating its road between two given points will not run the same to, or near certain other places from which it receives, subscriptions of stock. *Phillips v. Town of Albany*, 28 Wis. 840. How long it will take an express company to carry a sum of money from one city to another. *Rice v. Montgomery*, 4 Biss. 75. The locality of streets and avenues and their termini, and numbers of the houses situate thereon. *People v. Callahan*, 23 Hun, 579; s. c., 60 How. Pr. 372; *Allen v. Scharringhausen*, 8 Mo. App. 229. Of the proper orthography or pronunciation of names in the Polish language. *State v. Johnson*, 26 Minn. 316. That kerosene is a refined coal oil, or that it is a refined earth oil. *Bennett v. North British, etc., Ins. Co.*, 8 Daly, 471; affirmed, 81 N. Y. 273. An indictment for unlawfully selling "malt liquor" is insufficient, as the courts of this State cannot judicially say that all malt liquors are intoxicating. *Shaw v. State*, 56 Ind. 188. That "lager beer" belongs to the prohibited character or class of liquors designated in a statute as "beer." *People v. Hart*, 24 How. Pr. 289.

ALONZO V. STATE.

(15 Tex. Ct. App. 378.)

Criminal law — former acquittal — adultery.

On a prosecution for adultery the former acquittal of the co-defendant cannot be pleaded in bar.

CONVICTION of adultery. The opinion states the point.

Showalter & Micholson, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. Defendant and one Lydia Huberick were jointly charged by information with living together in adultery, defendant being unmarried, and said Lydia being a married woman. Lydia Huberick severed from her co-defendant upon the trial and was tried first, the trial resulting in her acquittal. When defendant's case was subsequently called for trial he filed a special plea of

Alonzo v. State.

former acquittal, in substance setting forth that the information charged a joint offense against Lydia and himself; that they were charged with adultery with each other; that a severance was granted; that Lydia had been tried and acquitted for said offense; and that her acquittal in law operated as an acquittal also of himself of the said charge. On motion of the county attorney this plea was stricken out, and this action of the court is assigned as error.

In North Carolina it has been held that "after the acquittal of one of the defendants (in a joint charge of adultery), there could be no judgment against the other. The crime charged on these persons could not be committed but by both of them; and upon a verdict that one of them was not guilty, it appears conclusively that the other could not be. It is exactly like the case of riots, conspiracies, and principal and accessory which we find in the books. The farthest the courts have gone is to allow one of the parties to be tried by himself and convicted, and then judgment is given against that party because as to him the guilt of the other party is found as well as his own. But when the one has been previously tried and acquitted, or when both are tried together and the verdict is for one, the other cannot be found guilty, for he cannot be guilty, since a joint act is indispensable to the crime in either, and the record affirms that there was no such joint act." *State v. Mainor*, 6 Ired. 340; *State v. Parham*, 5 Jones, 416.

We cannot give our assent to the doctrine of the above cited cases, nor to the reasoning upon which the same are founded. We think the reasoning of these decisions is based upon false premises and is fallacious. While it is true that to constitute adultery, there must be a joint physical act, it is certainly not true that there must be a joint criminal intent. The bodies must concur in the act but the minds may not. While the criminal intent may exist in the mind of one of the parties to the physical act, there may be no such intent in the mind of the other party. One may be guilty, the other innocent, and yet the joint physical act necessary to constitute adultery may be complete. Thus if one of the parties was, at the time of committing the physical act, insane, certainly such party has committed no crime; but it certainly cannot be contended that the other party, who was sane, has committed no crime. So if one of the parties was mistaken as to a matter of fact, after exercising due care to ascertain the truth in

Alonzo v. State.

relation to such fact, which fact, had it been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact, would be innocent of crime. Penal Code, art. 15; *Watson v. State*, 13 Tex. Ct. App. 76. But suppose the other party was not mistaken as to such fact, but on the contrary, well knew the true fact which rendered the connection illicit, would this party be regarded as guilty of no offense because the mistaken party was innocent?

If the North Carolina rule is correct, it must apply also to fornication, bigamy and incest. Now suppose a father and his daughter are indicted for incestuous intercourse with each other. Upon trial of the daughter it is conclusively proved that at the time of committing the physical act she was an idiot, or that she was wholly ignorant of the relationship existing between herself and her father, without any fault of hers; of course in either of these cases she must be acquitted. Would it not be monstrous to hold that because of her innocence, her acquittal, the beastly father must go unpunished for his unnatural crime? Such cannot be the law, and such, we believe, is not the law as declared by the weight of authority.

In Missouri, it has been held, in a case of incest where one party had knowledge of the relationship and the other was ignorant of it, that the former may be convicted and the latter acquitted. *State v. Ellis*, 74 Mo. 385; s. c., 41 Am. Rep. 321.

In Tennessee, a question similar to the one at bar was decided adversely to the doctrine enunciated in the North Carolina cases referred to. As the opinion is very short and pointed, we will quote it at length. It is as follows: "Defendant and a woman named Green were jointly indicted for open and notorious lewdness. The parties severed for trial, and the woman was acquitted. A plea was filed in bar to the further prosecution on the part of defendant on the ground that the acquittal of the woman operated as equivalent to an acquittal of the man, as the offense could only be committed by two persons. The plea was demurred to, but the demurrer was overruled. The attorney-general declining to take issue on the plea, the defendant was discharged and the State appealed. We think the court erred in refusing to sustain the demurrer. The State might fail to be able to make proof of the offense in the trial of one party from many causes, yet might be able to make proof on the trial of the other. We so held at Nash-

ville some time since, and approve the holding. The acquittal of one could not show the other not guilty." *State v. Caldwell*, 8 Baxt. 576.

Mr. Wharton says: "The weight of authority is that the two participants in adultery may be joined in the indictment, or may be tried singly. And one may be convicted and punished without any conviction of the other." 2 Whart. Cr. Law, § 1730. Again this same author says: "In other joint offenses it is necessary to prove the concurrence of the participants. This however is not necessarily the case in adultery, of which a person may be guilty who commits the offense by force." 2 Whart. Cr. Law, § 1724. See also *State v. Saunders*, 30 Iowa, 582.

Mr. Bishop says: "As every offense to be punishable must be voluntary, so in particular must be adultery. But alike in adultery, and it is believed in fornication and incest, where the crime consists of one's unlawful carnal knowledge of another, it is immaterial whether the others participated under circumstances to incur guilt or not, just as sodomy may be committed with a responsible human being, or an irresponsible one, or a beast. Therefore the same act of penetrating a woman, who for example is too drunk to give consent, may be prosecuted either as a rape, or as adultery at the election of the prosecuting power. There are cases which deny this, and hold that adultery, fornication and incest can be committed only with consenting persons, and what is rape cannot be one of the others. But they are believed to proceed partly, and perhaps entirely, on special terms of statutes. Certainly in principle they can have no other just foundation." Bish. Stat. Crimes, § 660

But independently of other authorities, we think the provisions of our Code of Criminal Procedure are decisive of this question. Article 525 provides that the only special pleas allowed a defendant are, first, a plea of former conviction, and second, "that he has been before acquitted by a jury, of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular." Now how can it be said that this defendant has been acquitted upon an accusation upon which he has never been tried? We cannot perceive the applicability of a plea of former acquittal in such a case.

Again article 717 provides: "Where several defendants are tried together, the jury may convict such of the defendants as they deem guilty, and acquit others." No exception is made to the

Alonzo v. State.

operation of this provision in the case of a trial for adultery, or in any other case. Suppose the defendants in this case, being jointly indicted, had been jointly tried, and one of them had been acquitted, and the other convicted, would not such a verdict have been expressly authorized by the last quoted article of the Code? We think so, and being so warranted, the court could not have declined to pronounce the judgment of conviction.

We therefore hold that the court did not err in sustaining the motion of the county attorney to strike out the special plea of former acquittal filed by the defendant. The acquittal of his co-defendant could in no manner affect the question of his guilt or innocence, and the case must be considered without reference to such former acquittal of his co-defendant.

[Omitting other matters.]

Because of the errors we have designated, the judgment is reversed and the cause is remanded.

Reversed and remanded.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

LIEBKE V. KNAPP.

(79 Mo. 22.)

Corporation — contract — ultra vires.

A contract by a corporation organized to build a public bridge, with the proprietor of a newspaper, to give him stock of the company in consideration of his publishing articles favoring the enterprise and showing the value of it as an investment, is valid.

THE opinion states the case.

Geo. M. Stewart and J. H. Wieting, for appellants.

Glover & Shepley, for respondents.

SHERWOOD, J. The plaintiffs, under the provisions of the statute, moved the Circuit Court that execution issue against the defendants, claiming that the latter were the holders of certain shares of unpaid stock in the Illinois and St. Louis Bridge Company.

The contract made with the bridge company, as evidenced by a communication addressed by John Knapp to C. K. Dickson, president of that company, and his reply thereto, is set forth in the following letters, both bearing date September 30, 1867:

Liebke v. Knapp.

John Knapp to C. K. Dickson, president of the bridge company:

“I am desirous of becoming an associate in the bridge company, and hereby authorize you to propose my name for that purpose, and if elected will take \$20,000 of stock of said company.”

On the same day C. K. Dickson, as president, addressed the following letter to John Knapp:

“This is to certify that your proposition to subscribe for \$20,000 of the stock of the bridge company is made with the express understanding that the first \$5,000 of said subscription is to be deemed as paid in full by you. When a call is made on the stockholders beyond \$5,000 or twenty-five per cent of their subscription, you will be expected to pay such calls, or to notify me of your decision to limit your subscription to \$5,000, instead of \$20,000, when your interest in the company will be limited to that sum, which will be deemed full paid stock.”

The subscription thus made was subsequently enlarged to \$25,000 and transferred to the joint names of the defendants. All of the amount thus subscribed was paid on calls from time to time, except the \$5,000, for which a credit was duly given and entered on the books of the company, after the services for which the credit was allowed had been rendered.

The Circuit Court on hearing the evidence adduced, found for the defendants, thereby determining as a matter of fact that payment of the \$5,000 had been made; and as no declarations of law were asked on either side, no law point has been saved, so that the only question the record presents is whether there is any substantial testimony in the evidence to establish the payment claimed by the defendants to have been made.

The authorities are not in entire accord as to whether the payment of a stock subscription can be made in any thing else than money, some holding one way and some the other. But the class of authorities which declare that a subscription may be paid otherwise than in money, we regard as asserting a more reasonable doctrine, a doctrine better adapted to the practical affairs of business life. Regarding the matter then in this light, we shall rule that payment of stock subscriptions need not be in cash, but may be in whatever, considering the situation of the corporation, represents to that corporation a fair, just, lawful and needed equivalent for the money subscribed. Any other doctrine than this would, as it seems to us, place a corporation at a disadvantage, under a dis-

ability not contemplated by the law and under which a natural person does not labor. Besides a corporation, unless prohibited by statutory provisions, has a general capacity of contracting which the common law concedes to every one ordinarily competent to enter into binding engagements. *Baile v. Ins. Co.*, 73 Mo. 371, and cases cited.

The services to be rendered by the defendants were to consist of statistical articles, communications, etc., to be furnished by the friends of the bridge to be published from time to time in the *Missouri Republican*, and were similar in character to those other persons pay for. These articles were furnished and published to the full extent of the credit entered on the books of the bridge company, and the testimony tends to show that the value of the services rendered, and of the privileges thus afforded in the *Republican*, were even greater than the amount charged and agreed to be paid prior to the services performed. The objection is given that no data were given as to the precise value of the services rendered and of the privileges afforded. This objection is more specious than sound. In the very nature of things it would be impossible to tell with any degree of accuracy just how much in dollars and cents each day's publication of articles, statistical and otherwise, as well as communications would be worth ; and more than all, to tell beforehand just how long such publications would be required. Let us, as we lawfully may, look at the surroundings of the parties at the time the contract complained of was made, and thus determine if it was such a one as the law will sanction. A great public enterprise was afoot, no less than the spanning of the Mississippi river with a bridge connecting two States and affording easy, rapid and uninterrupted transit for the travel and commerce between them as well as the travel and commerce of the whole country. That enterprise, in and of itself, was in every respect and particular legitimate and praiseworthy, and had previously received the sanction of the Congress of the United States. In order to its success it was pre-eminently necessary that the public mind should be awakened and informed, touching the magnitude and importance of the undertaking, and of the prospective benefits to be derived from its being carried into successful execution. Large sums of money were necessary to be raised to bring about the completion of the bridge. Large sums were necessary to be raised to condemn or purchase property to be used in connection with the bridge and its approaches. The means chosen

Liebke v. Knapp.

by the company it would seem were wisely chosen, and were doubtless the best that could have been employed. If the company had seen fit to issue circulars containing facts, statistics and arguments in favor and furtherance of the enterprise, no doubt it seems could have arisen as to the lawfulness of such a method of making known the objects and benefits of the contemplated undertaking. If such a method be considered lawful the disbursement of the funds necessary to pay therefor would seem to follow as an unavoidable sequence. But such a method of communication would, though lawful, have been unusual, while that employed was not only usual but it would seem the most practical and satisfactory one for communicating with the public. It is true that the contract made with the proprietors of the *Republican* may be termed in colloquial language a "lumping bargain," but it is not easy to see how a contract more definite and particular in its terms could well have been made. Nothing is more customary than for a client to contract with his attorney to give him such a sum in gross for his services to be rendered in a particular case or during a certain period of time. Nothing is more customary than for a railroad corporation to make an agreement with a contractor for digging a cut or making a fill, agreeing to remunerate him therefor with a sum in gross. If such bargains are to stand it is difficult to see why the one now under consideration, though occupying the same footing, should be seriously called in question.

Nor do we find any reason for holding that evidence of the agreement that defendants were to pay for \$5,000 of the stock subscribed by publications of the character mentioned is evidence of a contemporaneous parol agreement, varying the written contract, and therefore inadmissible. It is always competent to show by parol the circumstances surrounding the parties at the time a contract is entered into, and always competent to show in like manner the consideration of that contract; and this without infringing the rule prohibitory of the introduction of evidence touching contemporaneous oral agreements. The consideration of the contract evidenced by the letters was not expressed therein, and had it been it was doubtless competent to show another and different consideration, or to show that the agreement, though made for a payment in money, had been discharged in whole or in part in another way. It is always competent to explain or contradict the consideration clause even in a deed, such clause possessing only the

force and character of a receipt. *Fontaine v. Boatmen's Savings Institution*, 57 Mo. 561; *Hollocher v. Hollocher*, 62 id. 267; *Baile v. Ins. Co.*, *supra*. Evidence as to the consideration was therefore, *a fortiori*, admissible in a case of this sort.

If our conclusion be the correct one, that the services rendered by the defendants in the manner stated were a valid and needed equivalent for the amount of stock which the defendants acquired thereby, that amount of stock cannot be regarded as stock only nominally paid for, but in point of fact, and in point of law, must be held as "fully paid-up shares." In the language of Lord Justice GIFFORD in *Drummond's* case, 4 Oh. App. 772: "If a man contracts to take shares he must pay for them, to use a homely phrase, in meal or in malt; he must either pay in money or money's worth; if he pays in one or the other that will be a satisfaction." So far has this theory been pushed by the English courts, that although the statute expressly provided that "every share in every company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same should have been otherwise determined by a contract duly made in writing and filed with the register of joint-stock companies at and before the issue of such shares," still, notwithstanding this statute, it was held that a credit by the company to a shareholder on account of a conveyance to them of specific property, such as they were authorized to purchase, was deemed a payment in cash. *Coates' case*, L. R., 17 Eq., 169; 7 Eng. Rep. 748; *Spargo's case*, L. R., 8 Ch. App. 407; 5 Eng. Rep. 626. And the conclusion reached in these cases rests upon the common-sense idea that the statute did not exact of the company the barren form, the idle ceremony, of taking a check from the share-holder for the value of his stock with one hand, and giving him simultaneously with the other a check for the same amount with the property which they were authorized to purchase from him. *Fothergill's case*, L. R., 8 Ch. App. 270. And accordingly it was ruled by those courts that in a proceeding to charge a share-holder as a contributory any evidence that will support a plea of accord and satisfaction will present a good defense. *Spargo's case*, *supra*. This doctrine of the English courts on the point in hand has been recently fully approved and followed in Maryland, *Brant v. Ehlen*, 59 Md. 1, and that court held that as the bill in that State did not seek to set aside the sale of the coal-land to the company on the "ground of

Liebke v. Knapp.

fraud," that therefore the question must be dealt with upon the assumption that the sale of the land and the purchase of the stock therefor were made in good faith. Mr. Justice Thompson, after reviewing the whole subject, announces a similar conclusion: "A corporation may take in payment of its shares any property which it may lawfully purchase. Such a transaction is not *ultra vires* or void, but is valid and binding on the original share-takers and upon the corporation, unless it is rescinded or set aside for fraud. While such a contract stands unimpeached, the courts even where the rights of creditors are involved, will treat that as a payment which the parties have agreed should be payment." Thomp. Stockholders, § 134. In this case confessedly there is no fraud and consequently that element is out of view.

But it is urged that the contract respecting the stock which was to be paid for in the manner stated was altogether inoperative and void in law, as being against public policy, and open, upright and fair dealing. We have attentively considered this branch of the case. The evidence indisputably establishes that though the editorials of the *Republican* favored the prosecution of the enterprise of the building of the bridge, yet that no charge was made for these editorials. It would seem then that the position of the plaintiffs goes so far as this, that if the editors and proprietors of a newspaper honestly and in good faith favor and support editorially the prosecution of a great public work eminently beneficial to the people of the immediate vicinity, and indeed of the whole country, a work previously sanctioned by governmental authority, this ought to and does render void any contract for remuneration for the publication in their paper of such articles as reading matter which tend to further and foster that work. Such a position we regard as wholly untenable and these are our reasons therefor.

This case in all its circumstances materially differs from those cases of which *Fuller v. Dame*, 18 Pick. 472, is the type. In that case Fuller, the plaintiff and stockholder in a certain railway company, by reason of securing the location of the depot for that railroad on certain flats, was to receive a direct personal and pecuniary benefit, a certain amount in money over and above that received by those with whom he was associated in that company. This of course would tend to warp his judgment and tend to make him exert an undue influence in securing for a private money consideration a particular location for the depot, and thus rendered that contract

void as repugnant to public policy and injurious to the public interests. Here on the contrary the defendants did not seek to locate the bridge at a particular point, nor were they employed to do so, nor were they to receive any superior individual advantages or any moneyed consideration for so doing. All the stock they received was to be paid for and was paid for in money or money's worth, and this whether the enterprise failed or prospered. Therefore judgment affirmed.

Judgment affirmed.

All concur.

STATE V. GRANT.

(79 Mo. 113.)

Constitutional law — legislation restoring competency of infamous witness.

The legislature may not restore the competency of a witness rendered incompetent by reason of conviction of felony.

CONVICTION of murder. The opinion states the point.

W. A. Harnsberger and R. H. Field, for appellant.

D. H. McIntyre, attorney-general, for State.

SHERWOOD, J. [Omitting other points.] The first point to which attention will be directed is, whether error was committed in admitting, over the objection of the defendant, the witness Miller to testify on the part of the State. Miller, in February, 1878, had been convicted of petit larceny, and the record of such conviction was produced by the defendant upon making such objection. In order to determine the point thus presented, it will be necessary to determine the meaning, force and effect of certain statutory changes which were made by the Revised Statutes of 1879, *i. e.*, whether the legislature intended them to apply to antecedent convictions, and if so, whether it was in the power of the legislature thus to apply them. As the law stood at the time of Miller's conviction, the General Statutes were then in force, section 66, chapter 201, providing that "every person who shall be convicted of

arson, burglary, robbery or larceny, in any degree in this chapter specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this chapter, shall be incompetent to be sworn as a witness or serve as a juror in any cause, and shall be forever disqualified from voting at any election, or holding any office of honor, trust or profit, within this State. In the revision of 1879 the words "to be sworn as a witness," were omitted. § 1378. Similar statutory changes also occur in the present revision. §§ 1416, 1467. Do these omissions, these changes in the law, apply retrospectively? Were they intended to apply in that way?

[Omitting this discussion.]

But there are reasons, and very cogent ones, it would seem, which may be urged to show that even had the legislature intended that the omission of the words "to testify as a witness" should relate to antecedent convictions, should upon those convictions, lop off a portion of a judgment of a court of competent jurisdiction, and restore to competency one whom the law beforehand, and the judgment of the court subsequently had branded as infamous—that this was something altogether beyond the pale of legislative power. After judgment has been passed upon an offender, there are but two ways whereby he can be relieved from the results flowing from that judicial act; first, by a reversal of the judgment, and second, by a pardon. 1 Greenleaf Ev., § 377 and cases cited. But it is said that "a distinction had been taken where the incompetence is the general constructive result by presumption of law on conviction on an infamizing charge, and where it is expressly included in the legislative sanction as a consequence annexed to the particular offense and that inseparably, until the judgment be reversed." Therefore the law is now held to be that on perjury at common law the party pardoned may be a witness, because a king has power to take off every part of the penalty. * * * But if a man be indicted for perjury on the statute the king cannot pardon so as to discharge this incompetency, for the king is excluded and divested of that prerogative by the express words of the statute: "The oath of such person so offending not to be received in any court of record." or as the statute elsewhere expressed it, "the offender from thenceforth to be discredited and disabled forever to be sworn in any of the courts of record." 1 Gilb. Ev., 260; 1 Greenl. Ev., §§ 377, 378; 1 Chitt. Crim. Law, 602, 776; 7 Bac. Abr., 417; 3 id. 487.

But a party thus convicted might have been restored by a statute pardon ; *Rex v. Ford*, 2 Salk. 690 ; and the authorities cited state that the reason of the difference between the two kinds of pardon is this : that in a pardon based on a prosecution based on the common law the loss of certain civil rights only flows from the conviction as a consequence of the judgment ; while in a conviction based on a statute which annexes certain disabilities to the conviction of the crime by express words, the disabilities under the sanction of the law become part of the judgment. *Rex v. Ford*, *supra*, and cases cited ; *Rex v. Griepo*, 1 Ld. Raym. 256 ; 3 Bac. Abr. 487, and cases cited. The disability which the statute of 5th Elizabeth annexes to the commission of the crime of perjury was construed to be a part of the punishment, and where conviction followed prosecution the disability was held to be part of the judgment. And it does not appear to have been necessary that the provision of the statute touching the disability should have been formally entered on the record, in order that it constitute a part of the judgment. 2 Hargrave's Jurid. Arguments, 221. According to the author just cited, where the power of the king to pardon is discussed with distinguished clearness and ability, it may well be doubted whether the distinction taken in the authorities previously cited, between a pardon based on a common-law conviction and one based on a statutory conviction, is well taken. But there appears to be no difference of opinion as to the view that where the statute annexes certain disabilities to the commission of a crime, upon conviction of the crime those disabilities form part and parcel of the judgment, and it would seem at first blush that this must be so. *Ex. gr.* : it is a familiar rule that whatever the law implies will be as much part of a contract as if expressly inserted therein ; and as to judgments in civil cases the same rule prevails. A judgment for the recovery of money will bear six per cent interest, though no such statement be made in the judgment entry. A judgment lien will last for three years, though in the judgment itself no such statement be entered, and a judgment will be valid and binding for ten years though the record entry of the judgment be silent on the point. From these premises the conclusion may rationally be drawn that under the statutory provisions now being discussed the disabilities which that statute annexes to the commission of a certain offense form, where conviction follows prosecution, part and parcel of the conviction. And if such disabilities do not form, in contemplation of law, part

of the judgment of conviction — part of the punishment annexed to the crime — then the record of the judgment of conviction would afford no evidence that the disabilities denounced by the statute had been incurred. The statute of 5 Elizabeth does not require, no more than does section 1378, that the disabilities specified should in *haec verba* form part of the judgment of conviction.

Now the question arises, if section 1378 is to have a retroactive effect, whether it does not exceed the power of the legislature. Under the present Constitution “powers of government are divided into three distinct departments — the legislative, executive and judicial — each of which shall be confided to a separate magistracy ; and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instance in this Constitution expressly directed or permitted.” Art. 3.

If the conclusion be the correct one that the disabilities annexed to a conviction of the crime of petit larceny form part of the punishment, and of consequence part of the judgment, then it would seem to follow as an obvious and necessary sequence that any act of the legislature professedly remitting a portion of the judgment, professedly relieving the convict of one of the disabilities incurred, cannot prevail, if the Constitution, which forbids one department of the government from the exercise of any power properly belonging to either of the others, is to be obeyed. To push the point at once to its logical extreme, suppose that the legislature had also omitted from section 1378 the words, “to serve as a juror in any cause and shall be forever disqualified from voting at any election, or holding any office of honor, trust or profit, within this State,” would any one possess sufficient temerity to contend that such omissions would restore every convict theretofore convicted to his former civil status, rehabilitate him with his former rights of citizenship, and resurrect him from his civil grave ? If the legislature could accomplish such an end by such means, then it would be competent for that body to pass a general law proclaiming in terms that every convict theretofore convicted should be restored to all the civil rights, capacities and privileges lost by reason of his conviction ; and such a law would be valid and accomplish the design expressed on its face. For what the legislature may do indirectly, that may they directly. But such an enactment, in my opinion,

would be clearly trenching upon the power of the governor and be a usurpation by the legislature of the pardoning power ; for if the legislature can remit any portion of the sentence or judgment of a court of competent jurisdiction, then there is no obstacle to their remission of the whole sentence. The difference is only in degree and not in kind. I take it that when the statutes annex certain disabilities, the loss of certain civil rights, to the conviction of a crime and a conviction that crime thereafter occurs, thereupon by force and operation of the law and of the judgment of conviction the disabilities become welded to the crime, forming thereby an indivisible integer incapable of separation by any exertion of legislative power. And this is especially true under a Constitution such as ours. The position here taken is plainly this: That the pardoning power is vested by our Constitution alone in the governor ; that aside from the reversal of the judgment in a criminal cause, the only method of relief from the disabilities annexed to such judgment is by a full pardon of the offense, and that while the crime itself remains unpardoned, the disabilities annexed thereto will remain unaltered and unaffected by any legislative act. I will cite some cases illustrating this position :

In Pennsylvania, which possesses, so far as concerns the point in hand, a Constitution substantially identical with our own, the legislature in 1861 passed an act providing for a graduated deduction from the term of sentence of every prisoner in the penitentiary who should have no infraction of the rules recorded against him. Two convicts made application by *habeas corpus* for their discharge under the provisions of that act, whereupon the Supreme Court said : “ A majority of us think the act is unconstitutional as interfering with the judgment of the judiciary. The whole judicial power of the Commonwealth is vested in courts. Not a fragment of it belongs to the legislature. The trial, conviction and sentencing of criminals are judicial duties, and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record. Can it be reversed or modified by a board of prison inspectors ? If it can, what judicial degree is not exposed to legislative modification ? From what judicial sentence may not the legislature direct deductions to be made if this act be constitutional ? What they may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced and thus

State v. Grant.

assume the highest judicial functions? It is to be observed that these questions have reference to the power of the legislature to prescribe a general rule of law that shall be inconsistent with a previous judicial decree. Such a rule, when it operates on future cases and not retrospectively, is quite legitimate; their power to legislate in that manner is not to be doubted. But under the act in question the good conduct of a particular individual, under judicial sentence, is to work out for him an abatement of part of his sentence. In respect to one of the relators, who was convicted and sentenced before the law was passed, it is considered very clear that it is a legislative impairing of an existing legal judgment.

* * * Any interference with that sentence, except by a court of superior jurisdiction, or by the executive power of a pardon, would seem to be a prostration of that distribution of governmental functions which the Constitution makes among co-ordinate departments. In this view the act would be highly unconstitutional." *Com. v. Halloway*, 42 Penn. St. 446.

In Massachusetts this case occurred: McKenzie was sentenced to the State prison for forgery; subsequently the governor granted him a pardon, whereby, as set forth in the charter, the governor "remitted to McKenzie the residue of the punishment" he was sentenced to endure in the State prison. Thereafter McKenzie's deposition being offered it was objected to on the ground that the competency of McKenzie was not restored by said "charter of pardon," whereupon MORTON, J., after remarking upon the limited character of the pardon, said: "It is only a full pardon of the offense which can wipe away the infamy of the conviction and restore the convict to his civil rights. * * *

"We think the view taken by a former distinguished law officer of this Commonwealth, whose long experience in the administration of criminal law gave to his opinions the weight of authorities, are correct and sound. He says: 'There is but one mode now in use of restoring the competency of a witness, and that is by pardon under the great seal of the State, which when fully exercised is an effectual mode of restoring the competency of a witness. It must be fully exercised to produce this effect, for if the punishment only be pardoned or remitted it will not restore the competency and does not remove the blemish of character. There must be a full and free pardon of the offense before these can be restored and removed.'" *Perkins v. Stevens*, 24 Pick. 277.

In California also a similar point was discussed. A paper in the nature of a pardon was issued with the usual formalities to one Davis, which, after the usual recitals, but without pardoning the offenses, proceeded to "restore said Davis to all rights of citizenship possessed by him before his conviction for the offense above referred to." This pardon, it would seem, was granted expressly that Davis might appear as a witness, for the preamble recites: "Whereas it is desirable for the attainment of the ends of justice that he should be restored to citizenship." After this occurrence, Davis being offered as a witness in a criminal case, was objected to on the ground that his disability had not been removed by the paper offered; but this objection was overruled, and upon the point being discussed in the Supreme Court, the ruling was held to be error, WALLACE, C. J., saying: "The governor might have pardoned Davis had he seen fit; he was not the less the subject of the executive power in that respect because he had already suffered the punishment adjudged for his crime. Had he done so there is no doubt that his competency as a witness would have been thereby restored. But the executive act under review is not a pardon nor was it intended to be such. It did not purport to remove the guilt of Davis nor wipe away the infamy by the law of the land attaching upon him by reason of his conviction. It sought to restore him to all the rights of citizenship possessed by him before his conviction of the offenses 'above referred to,' and to so restore him while he yet remained a convicted felon and with the consequent legal infamy attaching by law to that status. The stain of his iniquity, flowing from his conviction, is still left upon him by the executive. The judgment of the law upon that fact is that the credit of his oath is so absolutely and effectually destroyed that he cannot be trusted to testify at all, that it is not to be hoped that he will speak the truth, but it must be conclusively assumed that he will not. If the judgment be reversed, the disability is of course necessarily removed; if the offense be pardoned the same consequence too would follow. But so long as the judgment remains, the guilt it fixes upon the convict is not taken away, and the disability necessarily remains; they are legally inseparable." *People v. Bowen*, 43 Cal. 439; s. c., 13 Am. Rep. 148. To the same effect is *Blanc v. Rodgers*, 49 Cal. 15; see also *State v. Foley*, 15 Nev. 64; s. c., 37 Am. Rep. 458.

In Alabama certain persons had been fined, had paid the fine,

State v. Grant.

and the legislature had passed an act to return the amount thus paid by them. In considering this act GOLDTHWAITE, J., observed: "By article 4, section 11 of the Constitution of Alabama, the power to remit fines and forfeitures is given to the governor, and by the second article the powers of the government are divided into three distinct departments, the legislative, executive and judicial, and no one of these departments or persons belonging hereto can exercise any power properly belonging to either of the others unless expressly directed or permitted by the Constitution.

* * * The only question is whether the act referred to is directly or indirectly an attempt to remit a fine. For if it be so, the mode or manner in which it is to be done is entirely immaterial. It is the right which the Constitution denies without reference to the mode in which it may be exercised. * * * It is the substance of the thing we must look at, and certainly it never could have been the intention of the framers of the Constitution to prohibit the legislature from remitting a fine, and yet allow that body to accomplish the same result by compelling the fine when paid to be refunded. * * * This is the case here; certain persons have been fined; it is not pretended that the fine has been remitted by the governor. It is conceded that the legislature has not the authority to remit; but after payment it is contended that body may legitimately refund the fines. To sustain this position would be to allow one department of the government to trench upon the power of another, and to defeat the purpose which the Constitution contemplated in confining the pardoning power to one branch of the government by permitting it to be indirectly exercised by another." *Haley v. Clark*, 26 Ala. 439.

In this State similar views have been expressed. The legislature passed an act relieving all persons then indicted for selling liquor prior to December 15, 1856, upon condition that they paid all costs and a fee of \$2, to the Circuit attorney, when it should be the duty of the Circuit judge to order such cases to be dismissed. SCOTT, J., in delivering the opinion of the court, after observing that the powers of the government were divided into three distinct departments, etc., and that the pardoning power was vested in the chief executive, remarked: "There can be no question as to the nature of the act under consideration; it is as effectually a pardon as though it were one in form under the great seal of the State. Its being clothed with the

forms of legislation cannot vary its nature and effect. If such laws are warranted by the Constitution, it is plain that the power of granting pardons is as fully in the general assembly as though it had been in express terms conferred on that body. * * *

Here is a prosecution depending in court, and the legislature comes in and orders the party to be released from it. What is that in effect but a judgment of acquittal?" And the act was held unconstitutional, as trenching both upon the pardoning power of the executive and the functions of the courts. *State v. Sloss*, 25 Mo. 291.

It will thus be seen that if the disabilities which the statute annexes to this commission of certain offenses constitute part and parcel of the judgment, the legislature cannot exscind a part thereof; that nothing but a full pardon of the crime itself makes the convict a new man and re-habilitates him with his former civil rights.

But it may be conceded that the disabilities do not form a part of the judgment, and yet the result reached is nowise altered, if it be true that nothing short of a full pardon or a reversal of the judgment can restore the convict to that which he has lost. That the deprivation of all civil rights is a punishment of great severity cannot be denied; nor can it be denied that but for the judgment such deprivation, such punishment, would not and could not have been inflicted. "Punishments not corporal are fines, forfeitures, suspension or deprivation of some political or civil rights, deprivation of office and being rendered incapable to hold office." 2 Bouv. Law Dict. In order to see this definition fully exemplified, it is only necessary to turn to the cases of *Cummings v. State*, 4 Wall. 277, and *Ex parte Garland*, id. 333. If then the act of the legislature relieves a convict of a part of the punishment, it is, *pro tanto*, a judgment of acquittal or *pro tanto* a pardon, either of which is, and both of which are, outside of the legislative domain. And the assertion of power on the part of the law-making branch of the government to abate one jot or one tittle of the punishment which the law through its agents, the courts, had previously inflicted, is necessarily and logically an assertion of the power to abate the entire punishment or to absolve or free the party adjudged to suffer that punishment from all its pains, penalties, incidents and consequences. Tested by the principles announced in the authorities I have cited, it seems very certain that section 1378, as amended, cannot operate on past transactions, even if so intended by the legislature.

State v. Grant.

Nor will it do to say that the omission in question may be justified on the ground that it was a mere alternation in the rules of evidence, or change in the method of procedure. Doubtless the legislature may alter the rules of evidence, so as to enable parties to testify in existing causes of action, where they could not do so before — as was done in *Rich v. Flanders*, 39 N. H. 323. But it is conceived that a marked distinction is to be taken between a legislative act which enables persons to testify who theretofore were unable to testify at common law, and a legislative act which assumes to do more than this, which assumes to make a person competent as a witness, who theretofore was rendered incompetent by a judgment of conviction of a crime, which crime remains unpardoned, and which judgment remains unreversed. In the former case, the law-making power is engaged in its legitimate calling of facilitating the ordinary business of the courts; in the latter, that of arrogating to itself judicial functions and usurping executive powers, which as already seen, it is altogether incompetent for the legislature to do. And even in cases where no judgment of a court debars legislative interference, authorities are not lacking to show that a limit exists which the legislature may not transcend, though it be in regard to the rules of evidence. Thus it has been ruled that an act authorizing conviction on the unsupported testimony of an accomplice on whose evidence alone no conviction could occur at the time the offense was committed, could not be applied in the trial of that offense. *Hart v. State*, 40 Ala. 32. And where a statute making that evidence which was not evidence before is passed to go into effect at a future day, one who commits a crime after its passage, but before it goes into effect, cannot be tried and punished under it. *State v. Bond*, 4 Jones L. 9.

For the error in admitting Miller's testimony, the judgment should be reversed.

[Omitting other points.]

For the errors aforesaid, the judgment must be reversed and the cause remanded.

All concur, except HENRY, J., who dissents on another point.

Dickinson v. Coates.

DICKINSON V. COATES.

(79 Mo. 251.)

Negotiable instrument — check — action by payee against drawee.

On an ordinary bank check for part of the drawer's deposit no action can be maintained by the payee against the drawee or its assignee before acceptance.*

ACTION on a check. The opinion states the case. The plaintiff had judgment below.

Pratt, Brumback & Ferry, for appellant.

Kagy & Magrath, for respondent.

NORTON, J. This case is before us on defendants' appeal from the judgment of the Circuit Court of Jackson county. It appears from the record that the Mastin Bank, a corporation organized under the laws of this State for the purpose of transacting a general banking business at Kansas City, on the 2d day of August, 1878, drew and delivered to plaintiff its check upon the Metropolitan National Bank of New York, as follows, to-wit:

\$500.

STATE OF MISSOURI,

No. 196,225.

MASTIN BANK,
KANSAS CITY, Mo., August 2, 1878. }

Pay to the order of M. H. Dickinson five hundred dollars.

JOHN J. MASTIN, *Cashier*.

To Metropolitan National Bank, New York."

It appears that the said Metropolitan National Bank was the regular correspondent of the Mastin Bank, and its depository in New York, and at the time the above check was drawn the Mastin Bank had on deposit and to its credit in the said Metropolitan National Bank, subject to draft or check, between \$50,000 and

* To same effect, *Colorado Nat. Bank v. Boettcher* (4 Col. 185), 40 Am. Rep. 142.

Dickinson v. Coates.

\$60,000; that on the 3d day of August, the day after the above check was drawn, the Mastin Bank closed its doors and made an assignment in due form of law of all its assets of every description to defendant Coates for the benefit of its creditors generally, of which said assignment the said Metropolitan Bank was duly notified on the day it was made; that the said check drawn in favor of plaintiff was not presented to the Metropolitan Bank till the 5th day of August, 1878, when payment was refused and the check protested for non-payment, of which due notice was given; that in the months of September and October, 1878, the defendant Coates, as assignee, collected of said Metropolitan National Bank between \$50,000 and \$60,000. The above are substantially the facts set out in plaintiff's petition, and he claims that they give him a right to a judgment and decree of the court, declaring that defendant Coates hold the money so collected of the Metropolitan Bank to the use of plaintiff, and that he be ordered to pay over to plaintiff the sum of \$500, the amount of said check and interest thereon. This claim is resisted by defendant Coates on the ground that the amount collected by him of said bank belonged to the trust fund held by him under the assignment, and can only be paid *pro rata* on claims against the trust fund allowed in the course of administering the trust. The Circuit Court made the order and decree as prayed for by plaintiff, and defendant, on this his appeal, asks its reversal, on the ground that it is against the evidence and the law of the case.

It will be perceived from the above statement that the controlling question arising on this record is: Did the check in question, it being neither drawn on any particular fund, nor for the whole sum due the drawer from the drawee, nor containing any words of transfer, operate before its presentment and acceptance by the drawee as an assignment either in law or equity of so much of the deposit standing to the credit of the drawer in the New York bank as the check called for? An affirmative answer to this question affirms, and a negative one reverses the judgment.

Inasmuch as the principle involved is one of importance and upon which there is some conflict of opinion, counsel, in view of the decision of the St. Louis Court of Appeals in the case of *McGrade v. German Savings Bank Association*, 4 Mo. App. 330, have earnestly insisted that the authorities bearing upon the subject be reviewed by us with a view to the settlement of the question in this

State. The conflicting authorities cannot be reconciled, and we shall not attempt it, but will only consider them for the purpose of ascertaining on which side of the question the weight of authority as well as reason lies. The question presented has been answered in the negative by the Supreme Court of the United States in the following cases: *Thompson v. Riggs*, 5 Wall. 663; *Bank v. Whitman*, 94 U. S. 343, *Christmas v. Russell*, 14 Wall. 69; *Bank of Republic v. Millard*, 10 id. 152.

In the case last cited, Justice DAVIS, who delivered the opinion of the court, observed: "It is no longer an open question in this court since the decisions in the cases of the *Marine Bank v. Fulton Bank*, and of *Thompson v. Riggs*, that the relation of the banker and customer in their pecuniary dealings is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it." * * * "The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder, when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded its payment, and although other checks drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result would follow the giving of checks, it would be easy to see that bankers would be compelled to abandon altogether the business of keeping deposits for customers." * * * "The right of a depositor," as was said by an eminent judge, "is a chose in action, and his check does not transfer the debt or give a lien upon it to a third person without the assent of the depositary. This is a well established principle of law, and is sustained by the English and American authorities."

In the case of *Christmas v. Russell*, *supra*, Justice SWAYNE, speaking for the court, said that "a bill of exchange or check is not an

Dickinson v. Coates.

equitable assignment *pro tanto* of the funds of the drawer, in the hands of the drawee."

The English authorities are to the same effect, of which the case of *Hopkinson v. Forster*, L. R., 19 Eq. Cas. 74; 11 Eng. Rep. 685, is a type, and where it was held that a check was not an equitable assignment of the drawer's balance at his banker's.

The courts of New York also return a negative answer to the question before us in the following cases: *Lunt v. Bank of North America*, 49 Barb. 221; *Chapman v. White*, 6 N. Y. 412; *Ætna Bank v. Fourth National Bank*, 46 id. 82; s. c., 7 Am. Rep. 314; *Duncan v. Berlin*, 60 N. Y. 151; *Attorney-General v. Life Ins. Co.*, 71 id. 325; s. c., 27 Am. Rep. 55. In the case of *Lunt v. Bank of North America*, *supra*, it is said: "Checks drawn in the ordinary general form not describing any particular fund, or not using any words of transfer of the whole or any part of the account standing to the credit of the drawer in the bank upon which they are drawn, but containing only the usual request directed to the bank, to pay to the order of the payee named a certain sum of money, are of the same legal effect as inland bills of exchange, and do not amount to an assignment of the funds of the drawer in the bank, and there is no liability of the party upon whom such an instrument is drawn until after it is accepted, and until payment or acceptance it is always revocable by the drawer." In the case of the *Ætna National Bank v. Fourth National Bank*, *supra*, it is said: "The relation of banker and depositor is that of debtor and creditor. Deposits on general account belong to the bank and are part of its general fund. The bank becomes a debtor to the depositor to the amount thereof, and the debt can only be discharged by payment to the depositor or pursuant to his order. Until payment or acceptance by the bank of a depositor's check or assignment of the credit by the depositor and notice to the bank, the deposit is subject to his order."

So in Pennsylvania, in the case of *Loyd v. McCaffrey*, 46 Penn. St. 410, it was said by Justice STRONG, speaking for the court, that "it cannot be maintained that Taylor's check, without more, amounted to an equitable appropriation of the funds in the hands of the banker to whom it was addressed. To make an order or draft an equitable assignment it must designate the fund upon which it is drawn."

So in Massachusetts, in case of *Carr v. National Security Bank*,

107 Mass. 45; s. c., 9 Am. Rep. 6, Justice GRAY, who delivered the opinion, speaking of general deposits, observed that "money deposited becomes the absolute property of the bankers, impressed with no trust, and which they may dispose of at their pleasure, subject only to their personal obligation to pay an equivalent sum upon his demand or order. The right of the bankers to use the money for their own benefit is the very consideration for their promise to the depositor. They make no agreement with the holder of his checks. A check drawn by a depositor in common form not designating any special fund out of which it is to be paid, nor corresponding to the whole amount due him from the banker at the time, is a mere contract between the drawer and the payee on which, if payable to bearer, and not paid by the drawee, any holder might doubtless sue the drawer, but which passes no title, legal or equitable, to the payee or holder in the moneys previously paid to the banker by the drawer." So in the case of *Bullard v. Randall*, 1 Gray, 605, it was held that a check for a part of the drawer's funds in a bank constitutes no assignment of that part of such funds until presented for payment and accepted by the bank, although verbally assented to by the cashier when absent from the bank. So in case of *Dana v. National Bank*, 13 Allen, 445.

In Maryland, in case of *Moses v. Franklin B'k*, 34 Md. 580, it was held that a check does not operate as an assignment *pro tanto* of the fund on which it is drawn, until it is accepted or certified to be good by the bank holding the fund; and the doctrine of the case of *Chapman v. White*, 6 N. Y. 412, approved, where it was held that a check before acceptance neither operates as an assignment nor creates any lien on the funds of the drawer. See also 2 Add. Cont. 493; 2 Byles Bills, note 1; Pars. Notes and Bills, 61, note *j*; also case of *Bush v. Foote*, 58 Miss. 5; s. c., 38 Am. Rep. 310.

We have been cited by counsel for plaintiff to a number of authorities as establishing a contrary doctrine to that assumed in those above referred to, and upon examination of them find but three States where the question has otherwise been ruled upon by the courts of last resort. In South Carolina, in the case of *Fogarties v. Skillman*, 12 Rich. 518, it was held by a divided court (the chief justice dissenting) that when a check is drawn by a depositor on a bank having sufficient funds to meet it, the holder, on giving notice to the bank, has the right to be paid, and if payment be re-

Dickinson v. Coates.

fused may maintain an action against the bank on the implied promise which the law raises in his behalf.

In Illinois, in case of *Munn v. Burch*, 25 Ill. 35, it was held that "the check of a depositor on his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for." Upon an examination of this case it will be seen that not a single authority, either English or American, is referred to as maintaining the doctrine announced; but the conclusion reached is made to rest upon a judicial recognition of what is alleged in the opinion to be a universal custom of bankers to allow depositors to withdraw their funds in parcels. This case was followed in 28 Ill. 168, also without the citation of a single authority, Justice CATRON remarking that "the decision of *Munn v. Burch*, was not made till after the most mature investigation." The case of *Munn v. Burch*, *supra*, was also followed in case of *Bank v. Bank*, 80 Ill. 212; s. c., 22 Am. Rep. 185, and as the logical result of the doctrine enunciated by it, the court went so far as to say that "after a check had passed into the hands of a *bona fide* holder it is not in the power of the drawer to contermend its payment," a doctrine not maintained by any authority that has come under our observation.

In Iowa, in the case of *Roberts v. Austin*, 26 Iowa, 315, it was held by a divided court that the holder of a check could maintain an action thereon against the drawer before acceptance, the drawer having funds in his hands, and that a general assignment of the drawer for the benefit of his creditors, after drawing the check, but before the same is presented, will not invest his assignee with the right to the money represented by the check, nor affect the rights of the payee therein.

The cases in Kentucky to which we have been cited, of *Buckner v. Sayre*, 18 B. Monr. 745, and *Lester v. Given*, 8 Bush, 357, do not maintain the position contended for. The said case of *Buckner v. Sayre*, only decides that the drawing of a bill of exchange by a debtor and its acceptance by the drawee is an appropriation of that fund to the holder of the bill, and that thereafter the drawer of the bill has no right to control it, either by receiving or assigning it, and that a general assignment of assets, after a bill of exchange has been drawn and accepted, will not pass the fund thus appropriated, and the ruling in the case of *Lester v. Given*, *supra*, is based solely upon the case of *Buckner v. Sayre*. So far from

the case in 18 B. Monr., *supra*, being in conflict with the New York and like cases cited herein from other States, it is in accord with them.

The decided weight of authority answers the question propounded in the beginning of this opinion in the negative. This answer is returned by the Supreme Court of the United States, the courts of last resort in Maryland, Massachusetts, New York and Pennsylvania, while an affirmative response is given by the divided courts of Iowa and South Carolina, and by the case of *Munn v. Burch*, 25 Ill. 35, which as an authority has been sufficiently adverted to in what has been said; and so far as this court has heretofore been called on to pass upon questions kindred to the one in hand, it has ruled in accordance with the doctrine announced by the Supreme Court of the United States and the courts of Maryland, Massachusetts, New York and Pennsylvania.

In the cases of *State v. Moore*, 74 Mo. 413, and of the *State v. Powell*, 67 id. 395, it was a general deposit created the relation of creditor and debtor; and in the case of *Brunett v. Crandall*, 63 id. 410, it was held that a portion of a debt was incapable of assignment either at law or in equity in the absence of the debtor's consent. So in the case of *Loomis v. Robinson*, 76 id. 488, it was held that an assignment of part of a judgment was void both at law and in equity. If as established by the above cases, the relation between depositor and banker is that of creditor and debtor, and a creditor cannot, either at law or in equity, assign a part of the debt due him without the debtor's consent, it must follow logically that the check held by plaintiff, being only for part of the debt due the drawer, and not having been accepted by the drawee, did not transfer to plaintiff either a legal or equitable right against the drawee, either to so much of the fund as the check called for or give him any lien thereon. In the case of *St. John v. Homans*, 8 Mo. 382, it was held, Judge Scott delivering the opinion, that "it could not be maintained that the mere act of drawing a check was an assignment of the amount for which it was drawn to the bearer."

In our investigation of this question we have confined our examination to the decisions of courts of last resort, and in the light of the authorities we must answer the question presented by this record in the negative, and hold that the fund sought to be appropriated by plaintiff to the payment of his debt and in the hands of

Ayres v. Farmers and Merchants' Bank.

defendant as assignee is only subject to *pro rata* distribution among the creditors of the Mastin Bank, of whom plaintiff is one, whose claims have been allowed in due course of administering the trust.

Judgment reversed and bill dismissed, and defendant shall have judgment for all costs.

Judgment reversed.

All concur.

AYRES V. FARMERS AND MERCHANTS' BANK.

(79 Mo. 421.)

Bank — paper for collection — title.

The plaintiff deposited with the Mastin Bank a check drawn by a third person, for collection and credit to his account. In accordance with an arrangement between the parties the Mastin Bank gave the plaintiff immediate credit for the check, and the plaintiff immediately drew against it. The Mastin Bank sent the check to defendant, its corresponding bank, who charged it to the drawer, and credited the Mastin Bank. The latter meantime had failed and made an assignment, but the defendant did not know it. *Held*, that the plaintiff could not recover on the check from the defendant.

ACTION on a check. The opinion states the case. The plaintiff had judgment below.

Lathrop & Smith, for appellant.

Gage, Ladd & Small, for respondents.

HENRY, J. On August 1, 1878, Wickstrum & Swinson drew their check on the defendant for \$500 in favor of H. W. Baker & Co., who indorsed it to plaintiff for a valuable consideration, and plaintiff sent it to the Mastin Bank for collection and credit to plaintiff.

There was evidence tending to prove a business arrangement between plaintiff and the Mastin Bank under which the amount of the check was passed to plaintiff's credit upon receipt of the check,

Ayres v. Farmers and Merchants' Bank.

and plaintiff was immediately entitled to draw against it, and on the day it was transmitted plaintiff drew upon the Mastin Bank for the full amount in favor of H. W. Baker & Co., from whom plaintiff received it; that the Mastin Bank received the check on the 2d day of August, 1878, and on that day gave plaintiff credit on their books for the amount and mailed to plaintiff a letter stating receipt of check and credit given, and on the same day charged the check to defendant, on whom it was drawn, and mailed it to defendant for credit to its own account; that on the day after the receipt of the check by the Mastin Bank that bank made a general assignment for the benefit of its creditors; that defendant received the check from the Mastin Bank by due course of mail, charged it to the drawers, who had sufficient funds on deposit with defendant to pay it, and credited the amount to the Mastin Bank without notice that the bank had failed and made a general assignment.

On the 7th day of March, 1878, the Mastin Bank sent the following card to plaintiff and defendant and its other correspondents:

“After this day this bank will give credit on day of receipt to its correspondents, as formerly, for cash items and checks on banks in the interior. To aid in the speedy transaction of business we request our correspondents to list all remittances for which they ask credit on receipt on a separate sheet from that on which is listed time paper and collections. The amount should be carefully stated and correctly footed. Instructions for shipment of currency or transfers to other points should be given on separate sheets, to prevent the same being overlooked.

JOHN J. MASTIN, *Cashier.*”

The following is the letter transmitting the check in question by plaintiff to the Mastin Bank:

“Citizens' Bank.

Capital \$100,000.

NORTH TOPEKA, KANS., 8-1, 1878.

J. J. MASTIN, Esq., *Cas.*,
Kansas City, Mo.

DEAR SIR — We inclose for collection and credit items as stated below.

Very respectfully,

J. THOMAS, *Cashier.*

Ayres v. Farmers and Merchants' Bank.

Abilene Bank.....	\$244 70
Abilene Bank.....	150 00
Farmers & M.....	500 00
Germ. Nat.....	4 22
B. & Allen.....	5 00
You.....	1, 847 10
	<hr/>
	\$2, 751 02
Latshaw — no pro.....	100 00
	<hr/>
	\$2, 851 02

This letter inclosed two checks mentioned in the pleadings and read in evidence as follows :

“\$244.70.

ABILENE, KANS., *July 29, 1878.*

ABILENE BANK.

LEBOLD, FISHER & Co.:

Pay to H. W. Baker & Co., or order two hundred and forty-four dollars and seventy cents.

M. V. BRILHART.

Indorsed, H. W. Baker & Co.

Pay J. J. Mastin, Esq., Cashier, or order, for collection account of Citizens' Bank, N. Topeka, Kan.

J. THOMAS, *Cashier.*

Pay and credit account of Mastin Bank, Kansas City, Mo.

JOHN J. MASTIN, *Cashier.*”

The other check dated July 30th, 1878, was made in the same form by E. Fuller Parent for \$150, and was indorsed just like that for \$244.70.

This action is for the recovery from defendant of the amount of the check for \$500, drawn by Baker & Co. upon the defendant. On a trial plaintiff had judgment, from which this appeal is prosecuted and the only question is : Under the business arrangement between the Mastin Bank and the plaintiff and defendant, what was the legal effect of the transactions between them with respect to that check ? Did it become the property of the Mastin Bank, in such sense that plaintiff cannot maintain his action against defendant on

Ayres v. Farmers and Merchants' Bank.

the check ? Morse, in his work on Banks and Banking, page 424, approves the following doctrine: " that if a bill or draft be forwarded by its owner for collection, and by order or custom of dealing the party receiving it places the amount to the credit of the owner, and the owner thereupon draws or is entitled to draw against the same as cash, this works a transfer of title, so that the owner cannot follow the paper or its proceeds in the hands of a third party receiving it in good faith and due course of business from the agent for collection." *Clark v. Merchants' Bank*, 2 N. Y. 380 ; *Scott v. Ocean Bank*, 23 id. 289. Lord ELDON, in *Ex parte Sargeant*, 1 Rose, 153, and several other cases, seems to have been of the opinion, it is said in a note to section 228 of Story on Agency, " that if the bills were entered as cash with the knowledge of the customer, and he drew or was entitled to draw upon the banker as having that credit in cash, he would thereby be precluded from recurring to the bills specifically." Judge Story says that this opinion of Lord ELDON was adopted by the vice-chancellor in *Ex parte Thompson*, 1 Mont. & McArthur, 112 ; and in *Clark v. Merchants' Bank*, *supra*, the court held expressly that " where the owner of a bill sends it to his correspondent to be collected, with directions to place it to his credit, and at the same time draws at sight against the fund, the title to the bill passes so that the proceeds cannot be followed into the hands of third persons receiving them in good faith."

The cases of *Sweeny v. Easter*, 1 Wall. 166; *White v. National Bank*, 102 U. S. 658; *First National Bank v. Reno Co. Bank*, 1 McCrary, 491; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Levi v. Bank*, 5 Dill. 107; *Mechanics' Bank v. Valleg Packing Co.*, 70 Mo. 643, and *Millikin v. Shapleigh*, 36 id. 598, are distinguished from the case at bar in the fact that in all those cases the paper was indorsed for collection only, and there is no conflict between any of those and the doctrine announced by Morse and the cases cited by him in its support. The case of *Lawrence v. Stonington Bank*, 6 Conn. 529, bears but slight resemblance to the case at bar. The draft there was drawn by a creditor upon his debtor, placed with a bank for collection, and that bank indorsed it for collection to the Eagle Bank, and the latter to the Stonington Bank for collection. On the 20th day of September the Stonington Bank had information that the Eagle Bank, which owed it \$60, had failed, and five days thereafter it presented the draft to the drawer who paid it, and the Stonington Bank placed it to the credit of the Eagle Bank

Landis v. Campbell.

and refused to pay the amount to plaintiff, claiming that the draft was the property of the Eagle Bank. That case in its facts is wholly different from this. Here the owner of the check indorsed it to the Mastin Bank not only to collect but to be placed to its credit as soon as received, with a right to draw immediately for the amount. It was in effect a purchase of the paper by the Mastin Bank, and the fact that on default of payment by the drawee that bank had recourse upon the indorser did not prevent the title from passing. Such is the right of every indorsee for value, but he is none the less the owner of the paper.

We have not copied and shall not comment upon the instructions, only to remark that they did not declare the law as herein announced, and we reverse the judgment and remand the cause, and on a re-trial the court will instruct the jury as herein indicated.

Judgment reversed.

All concur.

LANDIS V. CAMPBELL.

(79 Mo. 433.)

Libel — by religious society.

in the absence of proof of malice, the members of a session of a Presbyterian Church are not liable to an action of libel for excommunication from membership in the church for alleged falsehood.*

LIBEL. The opinion states the case. The plaintiff had judgment below.

B. F. Stringfellow and Judson & Motter, for appellants.

Ramey & Brown and Woodson, Green & Burnes, for respondent.

HENRY, J. Plaintiff commenced this action in the Circuit Court of Buchanan county against defendants Campbell and Sanders and Thos. E. Tootle, to recover damages for an alleged libel, charged to have been published by them.

* See *Sale v. Church*, ante, 136.

The petition alleged that plaintiff was a member of the First Presbyterian Church of St. Joseph, Missouri, and that defendants falsely, maliciously, etc., published of and concerning him, the libellous matter, consisting of a preamble, in which it was stated that plaintiff had made false and malicious statements concerning the pastor of that church, Campbell, and a resolution suspending plaintiff from the communion of the church. In a second count, omitting the formal parts, it was alleged that defendants published of and concerning plaintiff a certain other libel, consisting of the following: "You, meaning plaintiff, were by unanimous vote excommunicated." "Resolved, that Israel Landis be excommunicated."

Defendants filed separate answers, to the effect that defendant Campbell was pastor of said church, and that he and his co-defendants and other parties named were pastor and ruling elders of said congregation, and composed a judicatory known as the church session, which, by the laws of the church, has jurisdiction to admonish, rebuke and excommunicate members of said church found by them to be deserving of censure; that to this session defendant Campbell reported that plaintiff had made false and defamatory statements in regard to Campbell; that the session, at a regular meeting, in the performance of its duty in the regular administration of church discipline and according to the usages and practices of the church, without any malice toward plaintiff, and believing it within the scope of official duty, having found plaintiff deserving of censure, adopted said preamble and resolutions which were entered upon its record book. It is also alleged that there was another judicatory of said church, known as the presbytery, to which plaintiff had a right to appeal from the decision of the session, but that although notified of his suspension, he failed to prosecute an appeal. The same is in substance the answer to the second count, and the several answers of the other defendants do not differ materially from that of Campbell in the points which we shall consider.

It appears from the evidence that plaintiff had no notice that charges would be or had been made against him to the session nor was he present at the investigation. The evidence was conflicting on the question of veracity between plaintiff and the pastor, and we refrain from expressing an opinion as to the weight of evidence.

What plaintiff relied upon as a publication of the alleged libel

Landis v. Campbell.

mentioned in the first count was a reading of the same from a copy by the pastor to the congregation, the entering the same on the session minutes and exhibiting them to the members of the session by its clerk to get their signatures to them. What plaintiff insists was a publication of the alleged libel in the second count was the adoption of the same by the session, recording it upon its minute book, the oral announcement of the expulsion of plaintiff by the pastor to the congregation, a written copy of the proceedings furnished to plaintiff by Sanders as clerk of the session, and the exhibition of the proceedings to McDonald and Hulett, members of the session, in order to procure their signatures to the same.

There was a mass of evidence read to the jury, consisting of extracts from the constitution of the church and digests of its laws, and adjudications thereon in relation to the judicatories of the church, which the court left it to the jury to expound for themselves. If the civil courts take it upon themselves to administer the law of a church, their duty is to inform the jury what it is, and not to leave them to grope through the judicial literature of the church to ascertain it.

The main objection to the action of the session is its proceeding to investigate the charges against plaintiff, in his absence, without notice to him; and the court, in the instructions to the jury, adopted the view that this irregularity rendered the action of the session void, and that therefore it afforded defendants no defense to this suit and obviated the necessity of proving express malice against defendants. The court, among others, gave the following instructions at plaintiff's instance:

5. If the jury believe from the evidence that the session of the First Presbyterian Church convened on the 31st day of October, 1877, had no right under the constitution of the Presbyterian Church in the United States to suspend Israel Landis, the plaintiff, from the communion of said church, and adopt a preamble alleging that he had been guilty of malicious falsehood, without giving said Landis any notice that they intended to proceed against him as a member of the First Presbyterian Church in St. Joseph, for any violation of the constitution or discipline of the Presbyterian Church in the United States, and that defendants, in conjunction with other members of the session of the First Presbyterian Church, did adopt a preamble and resolutions finding that said Israel Landis had been guilty of malicious false-

hood, and suspending him from communion with said church, and all without notice to said Landis; and that said session of said church, on the 31st day of October, 1877, in conjunction with the defendants, agreed that the alleged libel set out in the first count of plaintiff's petition should be read at a public meeting on the following Friday evening by the defendant Campbell, and that said alleged libel was read by the direction of said defendants; then the fact that defendants claim to have been acting in an official ecclesiastical capacity, furnishes no excuse for such publication.

10. If the jury believe from the evidence that the paper writing set forth in the second count of the plaintiff's petition was the result of a concerted writing and agreement of and between the members of the session in proof, including the defendants, and that it was a part of said agreement that it should be read or announced publicly in the church, and that the same was so announced, and that the said paper writing was by the defendants, or either of them, with the consent or direction of the other, shown or read to any one, then such acts were sufficient publication of said paper writing by defendants.

The civil courts cannot review the decisions of ecclesiastical judicatories in matters properly within their province under the constitution and laws or regulations of the church. *Harmon v. Dreher*, 1 Speers Eq. 87; *Robertson v. Bullions*, 9 Barb. 64; *Shannon v. Frost*, 3 B. Monr. 261; *German Reformed Church v. Seibert*, 3 Penn. St. 282; *State v. Farris*, 45 Mo. 183; *Watson v. Garvin*, 54 id. 364. In *Shannon v. Frost*, the court said: "Whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court. * * We cannot decide whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church." "This court having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision." In *Harmon v. Dreher*, the court held that "a civil court will not look into the regularity of the process by which an ecclesiastical body proceeds to judgment." These cases and observations are cited with approval in the *State v. Farris*, 45 Mo. 183, and in *Watson v. Garvin*, 54 id. 364. This court, BLISS, J., observes: "In all the cases we find it first every where taken for granted, and it must necessarily be so under our system, that in matters purely ecclesiastical, not affecting property rights, the decisions of the proper

Landis v. Campbell.

church judicatory are conclusive upon civil tribunals. They will neither inquire into their correctness, nor question their accuracy." And this was substantially reiterated by Judge ADAMS in delivering the opinion of the court, on a motion for rehearing, in the same cause, in which he said: "In matters purely religious or ecclesiastical, the civil courts have no jurisdiction." In the case of the *German Reformed Church v. Seibert*, 3 Penn. 282, Seibert was expelled from the church by the consistory without the consent of the congregation, which was required by the articles of the church discipline, and the court held that "the decisions of ecclesiastical courts, like any other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the law of God and the discipline of the church," and "granting that the consistory had proceeded to disfranchise the relator without the consent of the congregation, the remedy is by appeal to a higher tribunal." When property rights are involved in the decisions of the church judicatories, such decisions may be reviewed by the civil courts, when properly brought before them. *Watson v. Garvin, supra*.

It is contended by respondent's counsel that section 10, article 11, of the Constitution of Missouri, requiring the civil courts to take cognizance of all cases of injuries to person, property or character, gives those courts jurisdiction of such actions as this. It simply declares that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character." Persons who join churches, secret societies, benevolent associations or temperance organizations, voluntarily submit themselves to the jurisdiction of those bodies, and in matters of faith and individual conduct affecting their relations as members thereof subject themselves to the tribunals established by those bodies to pass upon such questions, and if aggrieved by a decision against them, made in good faith by such judicatories, they must seek their redress within the organization as provided by its laws or regulations. If the civil courts should assume jurisdiction to review such proceedings upon alleged errors, they would attempt to administer laws not recognized by the Constitution or laws of the State, of which it may be said, without disparagement to the judiciary, they may be as ignorant as the most illiterate member of the association. Action for libel and slander would crowd the docket of the civil courts, which would, on that theory, be open to the complaint of every man expelled from a church, or masonic or

hood, and suspending him from communion with said church, and all without notice to said Landis; and that said session of said church, on the 31st day of October, 1877, in conjunction with the defendants, agreed that the alleged libel set out in the first count of plaintiff's petition should be read at a public meeting on the following Friday evening by the defendant Campbell, and that said alleged libel was read by the direction of said defendants; then the fact that defendants claim to have been acting in an official ecclesiastical capacity, furnishes no excuse for such publication.

10. If the jury believe from the evidence that the paper writing set forth in the second count of the plaintiff's petition was the result of a concerted writing and agreement of and between the members of the session in proof, including the defendants, and that it was a part of said agreement that it should be read or announced publicly in the church, and that the same was so announced, and that the said paper writing was by the defendants, or either of them, with the consent or direction of the other, shown or read to any one, then such acts were sufficient publication of said paper writing by defendants.

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Landis v. Campbell.

church judicatory are conclusive upon civil tribunals. They will neither inquire into their correctness, nor question their accuracy." And this was substantially reiterated by Judge ADAMS in delivering the opinion of the court, on a motion for rehearing, in the same cause, in which he said: "In matters purely religious or ecclesiastical, the civil courts have no jurisdiction." In the case of the *German Reformed Church v. Seibert*, 3 Penn. 282, Seibert was expelled from the church by the consistory without the consent of the congregation, which was required by the articles of the church discipline, and the court held that "the decisions of ecclesiastical courts, like any other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the law of God and the discipline of the church," and "granting that the consistory had proceeded to disfranchise the relator without the consent of the congregation, the remedy is by appeal to a higher tribunal." When property rights are involved in the decisions of the church judicatories, such decisions may be reviewed by the civil courts, when properly brought before them. *Watson v. Garvin, supra*.

It is contended by respondent's counsel that section 10, article 11, of the Constitution of Missouri, requiring the civil courts to take cognizance of all cases of injuries to person, property or character, gives those courts jurisdiction of such actions as this. It simply declares that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character." Persons who join churches, secret societies, benevolent associations or temperance organizations, voluntarily submit themselves to the jurisdiction of those bodies, and in matters of faith and individual conduct affecting their relations as members thereof subject themselves to the tribunals established by those bodies to pass upon such questions, and if aggrieved by a decision against them, made in good faith by such judicatories, they must seek their redress within the organization as provided by its laws or regulations. If the civil courts should assume jurisdiction to review such proceedings upon alleged errors, they would attempt to administer laws not recognized by the Constitution or laws of the State, of which it may be said, without disparagement to the judiciary, they may be as ignorant as the most illiterate member of the association. Action for libel and slander would crowd the docket of the civil courts, which would, on that theory, be open to the complaint of every man expelled from a church, or masonic or

hood, and suspending him from communion with said church, and all without notice to said Landis; and that said session of said church, on the 31st day of October, 1877, in conjunction with the defendants, agreed that the alleged libel set out in the first count of plaintiff's petition should be read at a public meeting on the following Friday evening by the defendant Campbell, and that said alleged libel was read by the direction of said defendants; then the fact that defendants claim to have been acting in an official ecclesiastical capacity, furnishes no excuse for such publication.

10. If the jury believe from the evidence that the paper writing set forth in the second count of the plaintiff's petition was the result of a concerted writing and agreement of and between the members of the session in proof, including the defendants, and that it was a part of said agreement that it should be read or announced publicly in the church, and that the same was so announced, and that the said paper writing was by the defendants, or either of them, with the consent or direction of the other, shown or read to any one, then such acts were sufficient publication of said paper writing by defendants.

The civil courts cannot review the decisions of ecclesiastical judicatories in matters properly within their province under the constitution and laws or regulations of the church. *Harmon v. Dreher*, 1 Speers Eq. 87; *Robertson v. Bullions*, 9 Barb. 64; *Shannon v. Frost*, 3 B. Monr. 261; *German Reformed Church v. Seibert*, 3 Penn. St. 282; *State v. Farris*, 45 Mo. 183; *Watson v. Garvin*, 54 id. 364. In *Shannon v. Frost*, the court said: "Whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court. * * We cannot decide whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church." "This court having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision." In *Harmon v. Dreher*, the court held that "a civil court will not look into the regularity of the process by which an ecclesiastical body proceeds to judgment." These cases and observations are cited with approval in the *State v. Farris*, 45 Mo. 183, and in *Watson v. Garvin*, 54 id. 364. This court, BLISS, J., observes: "In all the cases we find it first every where taken for granted, and it must necessarily be so under our system, that in matters purely ecclesiastical, not affecting property rights, the decisions of the proper

Landis v. Campbell.

church judicatory are conclusive upon civil tribunals. They will neither inquire into their correctness, nor question their accuracy." And this was substantially reiterated by Judge ADAMS in delivering the opinion of the court, on a motion for rehearing, in the same cause, in which he said: "In matters purely religious or ecclesiastical, the civil courts have no jurisdiction." In the case of the *German Reformed Church v. Seibert*, 3 Penn. 282, Seibert was expelled from the church by the consistory without the consent of the congregation, which was required by the articles of the church discipline, and the court held that "the decisions of ecclesiastical courts, like any other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the law of God and the discipline of the church," and "granting that the consistory had proceeded to disfranchise the relator without the consent of the congregation, the remedy is by appeal to a higher tribunal." When property rights are involved in the decisions of the church judicatories, such decisions may be reviewed by the civil courts, when properly brought before them. *Watson v. Garvin, supra*.

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odd fellows' lodge or temperance society, and every woman excluded from any of the societies of which this age is so prolific. Every such expulsion involves, to some extent, a charge of moral turpitude or conduct unbecoming a gentleman or lady. The constitutional provision has no such scope as this, and means only that for such wrongs as are recognized by the law of the land the courts shall be open and afford a remedy.

It follows from the principles announced in the above cases that if a judicatory of a church has jurisdiction, by its laws, to try a member for an offense involving immorality, its decision is final and not subject to be reviewed by the civil courts for alleged errors; that the civil courts will not examine into the question of errors in the proceeding, but give it the same force and effect as if it had been regular in every respect, and therefore instructions number five and ten, given for plaintiff, are erroneous. The acts of the session in suspending and expelling plaintiff afford a complete defense to this action, unless the charges against plaintiff were false, and the members of the session maliciously and falsely, or colorably made such proceedings a pretense for covering an intended scandal. *Farnsworth v. Storrs*, 5 Cush. 412; *Streety v. Wood*, 15 Barb. 105; *Shurtleff v. Stevens*, 51 Vt. 514; s. c., 31 Am. Rep. 698. And the burden of proving express malice is upon the plaintiff. *Shurtleff v. Stevens*, *supra*; *Townshend on Slander*, 386; 2 Add. Torts, 931; *Bradley v. Heath*, 12 Pick. 163; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Lewis v. Chapman*, 16 id. 369; *Vanderzee v. McGregor*, 12 Wend. 545; *Klink v. Colby*, 46 N. Y. 427; s. c., 7 Am. Rep. 360. The reading the preamble and resolutions of suspension was a publication within the meaning of that term, as employed in relation to libels; but when a member has been excommunicated it may be promulgated by the pastor by reading the resolution of expulsion in the presence of the congregation, according to the practice of the church, and that act will of itself furnish no foundation for an action against him. *Farnsworth v. Storrs*, *supra*. The court properly instructed the jury that neither the entry upon the book kept by the sessions for that purpose, of the resolution of suspension and excommunication, nor the announcement of the latter to the congregation by Campbell, was a publication of either of the alleged libels, but should also have included in the instruction the preamble to the resolution of suspension. It also correctly declared that the writing and sending of the letter in evidence by defendant Sanders

Landis v. Campbell.

to plaintiff was no publication of the libel, but erred in declaring that his exhibition of the paper to Hulett and McDonald, members of the session, for their signatures, was a publication. There was no evidence that Sanders or any one else exhibited the resolution to any one except McDonald and Hulett, members of the session, and the testimony was that it was shown to them only to procure their signatures to the paper as members of the session. That this was not a publication, see *Vanderzee v. McGregor*, 12 Wend. 545; *Klinck v. Colby*, 46 N. Y. 428; s. c., 7 Am. Rep. 360; *Lewis v. Chapman*, 16 N. Y. 369.

We have not deemed it necessary to notice particularly the instructions refused or given. We think that the court, on a new trial of this cause, can determine, by what is contained in this opinion, which should have been given and which refused. There is a mass of testimony in relation to the jurisdiction of the several judicatories of the Presbyterian Church and their modes of procedure, which we do not deem it necessary to notice, except to say that it was clearly shown that the session had jurisdiction to try the plaintiff on the charges preferred, and that he had an appeal to a higher tribunal in the church from its decision against him.

All concurring, the judgment is reversed and the cause remanded.

Judgment reversed.

A motion for rehearing was overruled.

But it was finally settled in Virginia, as in this State, that the basis of the measure of damages should be the value of the land at the time of the sale, and not at the time of the eviction, because the covenant of warranty, being a substitute for the old *warrantia chartæ*, contained generally in feoffments, the measure of recovery should follow that of the old action of *warrantia chartæ*, which was the value of the land at the time of the sale, and not at the time of the eviction. Like views have been adopted in almost all the States of the Union, and in the Supreme Court of the United States. But in a few States a different view has been taken; and the covenant of warranty, and other real covenants similar to it, have been regarded very much like other personal covenants, and their courts have declined to adopt as a basis for the measure of damages for the breach of covenants of warranty, and other like real covenants, the rule laid down in the old action of *warrantia chartæ*, but instead thereof have taken as the basis of the measure of damages for the breach of such covenants very much the measure of damages controlling in ordinary personal covenants, that is, instead of putting the vendee in the position which he would have been had he never entered into the contract, restoring to him his purchase-money, interest and costs of defending the title, they adopting the general rule, put the vendee in the condition in which he would have been if the vendor's covenant had never been broken. This is done by adopting as the basis of damages the value of the land, including all improvements upon it at the time of the eviction of the vendee. These views have been taken by the courts of Connecticut, Vermont, Maine, and Massachusetts, and also by the courts of Louisiana, which followed the civil law, and of course would not be influenced by the rule in the old common-law action of *warrantia chartæ*.

When the grantor is turned out of possession or kept out of possession by a stranger having a right of possession for an unexpired term in the premises conveyed, the covenant of warranty is broken, and the measure of damages in such case is the annual value of the land for the time the vendee is thus kept out of possession, together with the costs recovered against the grantor, when he was ejected, and his costs and counsel's fees in defending his possession against such stranger, if it were a case of eviction for a term of years, or some specific time. *Ricker v. Snyder*, 9 Wend. 416. If a grantor cannot give possession of an estate, which he has conveyed with

Moreland v. Metz.

covenants of general warranty and against incumbrances, because of a life-estate in the land conveyed being in a stranger, this is a breach of the warranty, and the measure of the damages is the value of the estate for the time during which the grantee has been or will be kept out of it. See *Christy v. Ogle's Ex'r*, 33 Ill. 295. These cases seem to have reached a conclusion, which is but a sequence of the doctrine laid down, as we have seen, in nearly all the States of the Union, that the measure of damages in case of a breach of a covenant of warranty is the value of the land at the time of the sale. If the eviction is but temporary, as for a number of years or for the life of some third party, the measure of damages should be the value of the land for the term of years or time that the vendee is evicted, that is the rental value of the land for the time the vendee is deprived of the possession, with of course the costs which he had to pay, or which he incurred if he was evicted by suit.

When however the rule for the measure of damages, which has been adopted in case of permanent eviction, is different from the general rule prevailing in Virginia and nearly all the other States, as for instance in Massachusetts, they have stated also a different rule when the eviction is for years. The rule stated in *Earle v. Kingsbury*, 3 Cush. 206, is that the vendee should recover a just compensation for the real injury resulting to him by such eviction for a term of years. It is admitted that this is a very vague and uncertain rule, and in its application it is admitted that one of the modes, in which this just compensation might be ascertained, would be by giving the annual value; and it was suggested that this might be found to be the just rule in the case then before the court. In *Mills v. Catlin*, 22 Vt. 107, though the general rule for the measure of damages, when there is a total eviction of the grantee in Vermont, is the same as in Massachusetts, yet where the incumbrance was a life estate, the measure of damages adopted in that case was the value of the life estate; but the court seemed to think it quite questionable whether this was the correct measure of damages. As in Massachusetts, this measure of damages in such a case does not seem consistent with their general rule, which puts the measure of damages in breaches of warranty and of other like real covenants on the same basis as ordinary personal covenants. But even in these States, where the eviction is not in fee but for a time only, there is obviously a disposition to adopt the value of the

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Moreland v. Metz.

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estate for the time for which the grantee is evicted, as the best, because the most certain measure of damages.

In Rhode Island, although there is a disposition to adopt the Massachusetts rule for measuring damages in a breach of a covenant of warranty by an eviction in fee, yet in *Porter v. Bradley*, 7 R. I. 538, the rule for the measure of damages, where the eviction was for the unexpired term of a lease, was the fair rental value of the land to the expiration of the lease. And in view of our law granting as the measure of damages, where there is a breach of a warranty by an eviction in fee of the whole land, nothing but the value of the land at the time of sale and interest from time of eviction and costs, and our refusal to allow as the measure of damages the value of the land at the time of the eviction, or any thing for improvements which the grantee may have put on the land and lost, or any thing for the loss of his bargain, if it were a good one, or any thing for any sort of inconvenience to which he may have been subjected by being evicted from his home, it would seem clear that when the eviction is for a year, as in this case, the only damages which can be allowed the vendee is the rental value for such year. The rent actually paid for the year to the grantor or to any one else would be *prima facie* this fair rental value for the year; but it might be proven that it was less than the fair rental value; and if this was shown, this fair rental value should be allowed, and not the actual rent paid that year. *Bolling v. Lersner*, 26 Gratt. 36.

In this case, the court allowed to the grantee as damages for the breach of the covenant of warranty \$50 which was proven to be the actual rent paid for the land for the year during which the grantee did not have the possession of it, and there was no proof that it was not the fair rental value for that year. The court properly adopted it as such fair rental value and as the true measure of the vendee's charges to be abated from the purchase-money unpaid. There was of course no necessity to make any order of reference to ascertain this damage, for it was simply a year's rent of the farm, which could readily be determined by the court without the aid of a commissioner's report.

If the fraud, as is alleged by the vendor, induced the vendee to purchase the farm with the assurance that she could get possession of it immediately, and if she purchased because she wanted a home, into which she could move with her family, and the grantor knew

Moreland v. Metz.

when he sold the land to her that he could not give possession of it for a year, and fraudulently concealed this from her, though he knew that this was a very strong reason with her for purchasing this land, then in certain of the States a different measure of damages from this mere rental value of the land for a year would be adopted. But nowhere, even under such circumstances as I have imagined to exist, could she have had any such damages as she claims. To allow such claims for damages in any case would be to violate fundamental principles of law by giving remote and speculative damages, which could not be said properly to have been the result of the misconduct and fraud of the vendor had he been guilty of such conduct. But most of the damages claimed by the defendant had no connection as cause and effect with the supposed misconduct and fraud of the vendor.

The decree of the Circuit Court of December 21, 1882, must be affirmed, except so far as it directs a sale of the Marsh farm on the terms and credits prescribed in that decree, which have become improper by reason of the notes of the defendant Minerva J. Metz, which are liens on the lands, having become due and payable since the said decree was rendered. And thus it has become necessary and proper to modify this portion of said decree, and for this purpose the cause must be remanded to the Circuit Court of Tucker county with instructions to enter a decree for the sale of this Marsh farm in such part thereof as is necessary to pay the lien declared and established upon it by said decree of December 21, 1882, and naming a commissioner or commissioners to make such sale, fixing in the decree such terms and conditions of the sale, as to the said Circuit Court may seem just and proper, and otherwise to proceed with this cause according to the principles governing courts of equity; and the appellants must pay to the appellees their costs in this court expended and \$30 damages.

Affirmed in part. Remanded.

SODIKER V. APPLGATE.

(21 W. Va. 411.)

Partnership — interest in profits for services.

An agreement that an employee shall have a specified share of the profits of the business for his services does not constitute a partnership. (*See note, p. 255.*)

SUIT to settle a partnership. The opinion states the facts. The plaintiff had judgment below.

G. W. Caldwell, for appellant.

J. C. Wright, for appellee.

SNYDER, J. Suit in equity brought by William Sodiker against Lewis Applegate, in June, 1879, in the Circuit Court of Brooke county, to settle the accounts of an alleged partnership between the plaintiff and defendant, for running a grist and flour mill, buying and selling grain and the products of the mill. The bill avers, that by the terms of the partnership the defendant was to furnish the grist-mill then owned by him and put the same in repair at his own expense, the plaintiff was to run and operate the mill, the funds for carrying on the business and keeping the mill in repair was to be furnished by the parties in equal portions and the profits were to be shared equally between them.

The defendant, in his answer, positively denies that any partnership of any kind existed between him and the plaintiff; he avers that while the plaintiff worked at his mill, he did so as a hired hand; being without means and penniless, he was employed to run the mill so long as he might do so satisfactorily to the defendant and the customers of the mill. The cause was referred to a commissioner for an account, depositions taken, and the commissioner reported that in his opinion no partnership existed, but if the court should decide that the proofs established a partnership, he reported due to the plaintiff \$126.87.

The plaintiff excepted to that part of the report which found that no partnership existed, and the court by its decree of June 14,

Sodiker v. Applegate.

1883, sustained said exception, and decreed that the plaintiff recover from the defendant the said sum of \$126.87 and costs. From this decree the defendant appealed.

As I am clearly of the opinion that no partnership existed between the plaintiff and defendant, it is only necessary to refer to the evidence in relation to that matter. The plaintiff in his deposition, after stating the terms of the partnership as alleged in his bill, says : “ I did grind the wheat I bought with my own money, and sold the flour on my own account and got the money. The wheat that Lewis Applegate bought I ground, took the toll from, and Applegate sold the flour on his own account. All the other grain that came into the mill was disposed of in the same way.” He exhibits with his deposition, and testifies to their correctness, certain accounts for work done by him and for bills paid for repairs to the mill, for boarding hands, and for money paid for wheat, all of which are made out in his name against the defendant. The one-half of these accounts is what constitutes the sum found by the commissioner, and on which the decree against the defendant is based. There are no credits on any of these accounts and no charges of any kind in favor of the defendant. Nothing appears as to the business of the alleged partnership. No charges in favor or against it. In fact, there is not in the evidence or the accounts filed any thing having any relation to the affairs of any partnership or any thing to show that any partnership business was done, from which any profits or losses could have arisen. If any partnership existed, the facts altogether fail to show it. The accounts filed and relied on by the plaintiff are simply charges alleged to be due to him individually from the defendant. They are made out not against any firm, but against the defendant personally. They therefore disclose on their face that the plaintiff did not regard them as partnership accounts, but merely as items due to him from the defendant for work done, money paid, etc., for the use of the defendant as an individual. For these claims, if they are just, the plaintiff has a plain and adequate remedy by action of *assumpsit* at law.

The plaintiff was the person who had charge of the business, and if there was any partnership, he was the partner to render an account, and not the defendant. But instead of doing so, he brings his suit based exclusively on private charges in his favor against the defendant. There are no allegations or proofs anywhere in the record that there are any assets or debts belonging to or due from

the alleged partnership. If there were any assets or profits they ought to be in the hands of the plaintiff as the acting partner, and therefore cause for a suit might exist against him for an account, but it is difficult to conceive why he should have occasion to sue the defendant, who had nothing to do with the management of the alleged partnership. If the accounts and transactions disclosed in this record constitute a partnership and entitle the plaintiff to maintain this suit, then not only would every employee be a partner of his employer, but every person who had a private account against another could sue his debtor as a partner in a court of equity and recover.

It is apparent from the evidence in this cause that no partnership existed. The only agreement between the plaintiff and defendant is stated by the plaintiff when he says : " My agreement was, Mr. Applegate was to furnish me a house to live in, and I was to have the half. It was to be half and half between us. Inside repairs of the mill were to be done by me, and half of the expenses to be paid by each. Outside repairs to be paid by Lewis Applegate ; was no agreement by us as to losses."

The evident meaning of this language as shown by the other testimony and facts is, that the plaintiff was employed by the defendant to take charge of his mill as miller, and for his services in that behalf the plaintiff was to receive one-half the tolls or earnings of the mill. The half of the earnings or profits to which the plaintiff thus became entitled did not make him a partner. This merely constituted the manner of payment and the measure of his compensation for his service as miller.

To constitute a partnership between the parties who share in the profits, the interest in the profits must be mutual ; that is, each person must have a specific interest in the profits as a principal trader ; he is not a partner if he merely receives out of the profits a compensation for his services as an agent, employee, or servant. Coll. Part., § 31, Thus where A. purchased goods for an adventure on the credit of B., and it was agreed, "that if any profits should arise from them, B. should have one-half for his trouble, it was held that this was not a partnership between the parties." *Hexketh v. Blanchard*, 4 East, 144. In all cases there must be a participation as principal. If the persons merely occupy the relation of principal and agent, employer and employee or factor, no partnership can be predicated upon the fact that such agent, em-

Sodiker v. Applegate.

ployee or factor receives a part or share of the profits for his services or other benefits conferred. This proposition is illustrated by numerous cases, among which are the following: *Berthold v. Goldsmith*, 24 How. 542; *Burckle v. Eckhart*, 1 Den. 341; *Bowyer v. Anderson*, 2 Leigh, 550; *Chapline v. Conant*, 3 W. Va. 507; *Dils v. Bridge*, 23 id. 20; *Hanna v. Flint*, 14 Cal. 73; *Morgan v. Stearnes*, 41 Vt. 397.

In every partnership there is a community of interest, but every community of interest does not create a partnership. There must be a joint ownership of the partnership funds, or a joint right of control over them, and also an agreement to share the profits and losses arising therefrom. Thus an agreement between A. and B. that A. shall work B.'s farm upon shares and divide the produce, does not constitute them partners *inter sese* or as to third persons. *Putnam v. Wise*, 1 Hill, 234. Nor are the owners of real estate, who contract with mechanics to build a mill or other building upon their land, partners *inter sese*, but either party paying more than his share of the expense of the construction, may recover such excess of the other owner in *assumpsit*. *Porter v. McClare*, 15 Wend. 187.

It is unnecessary to illustrate further what particular facts and agreements do or do not constitute a partnership. The books are full of nice distinctions and definitions showing that it is often difficult to decide to which class the particular facts and circumstances assign cases. In the case before us however there is no such difficulty. Under none of the authorities or definition could this be classed as a partnership.

I am therefore of opinion that the decree complained of must be reversed, with costs to the appellant and the plaintiff's bill dismissed with costs.

Judgment reversed.

NOTE BY THE REPORTER.— See 32 Am. Rep. 269; 36 id. 113; 25 id. 607; 22 id. 94, 337; 37 id. 527; 43 id. 8; 42 id. 99; 27 Eng. Rep. 512; 8 Am. Dec. 207, note; *Pond v. Cummins*, 50 Conn. 372; *Rushing v. People*, 42 Ark. 390.

In *Cothran v. Marmaduke*, 60 Tex. 372, the court said: "Upon the trial the court instructed the jury, that 'If defendant loaned or advanced money to J. & D. Caviness to be used in the purchase and sale of cotton, hides, etc., and was to receive a part of the profits of the business as a consideration for such loan or advance, I instruct you that he was a partner, but if on the other hand he was to receive a fixed sum from the profits of the business as a compensation for the use of his money, he was not a partner.'

Sodiker v. Applegate.

“ Appellant insists that the court erred in the criterion furnished for the purpose of determining whether or not he was in fact a partner. Both at common law and in equity, where a party by agreement had a right in the entire net profits, which entitled him to a definite share as profits, he was considered a partner. *Chester v. Dickinson*, 54 N. Y. 1.

“ It is not essential to constitute a partnership that the parties were by agreement to share in the losses, but it is sufficient if they are to have a community of interest in the profits as such. *Goode v. McCartney*, 10 Tex. 195; *Manhattan Brass Co. v. Sears*, 45 N. Y. 797.

“ In Story on Part., § 58, it is said ‘that he who is to take a part of the profits shall by operation of law be made liable to losses as to third persons, because by taking a part of the profits he takes from the creditors a part of that fund which is the security for the payment of their debts.’

“ In determining the question the court will look to the actual relation consequent upon the engagements of the parties, and in favor of creditors they will ordinarily apply the doctrine that the party who shares in the profits must also bear his share of the liabilities. And it is said that this is applied as a rule of law. That to obviate its force and effect, it is not sufficient that the parties did not intend a partnership, or that they intended there should be none. To do this, it must be shown that they intended and constituted a distinct and different relation excluding that of partnership. *Owens v. Mackall*, 33 Md. 282; *Parker v. Canfield*, 37 Conn. 250; *Eastman v. Clark*, 53 N. H. 276; *Leggett v. Hyde*, 58 N. Y. 272.

“ It has been held that as to third persons it is sufficient to show a communion of interest in the profits to establish the relation of partnership. *Sheridan v. Medora*, 10 N. J. Eq. 469; *Lengle v. Smith*, 48 Mo. 276.

“ From these authorities it would seem that if appellant advanced the money, upon the agreement that he was to share in the net profits resulting from the enterprise, this would entitle him to an account to ascertain the result of the enterprise. And this, together with the further fact that such profits constitute partnership property to which creditors could resort, would constitute appellant a partner.

“ The true distinction is this: Where a clerk or agent by agreement is to receive a fixed portion of the profits as compensation for his time or labor, that he does this as clerk or agent and not as principal, for the partnership fund or effects may be legally used in paying such clerk or agent for his time and services. Therefore the fact that the effects are not resorted to for this purpose, until profits have accrued and become effects, would not make the clerk or agent receiving such effects as compensation for his services a partner. But when one advances money under an agreement that the principal is to be refunded, but for compensation he is to share in the net profits of the adventure, this makes him a partner, for he is then to share in the profits as a principal and not as a clerk or agent.”

In *Claflin v. Hirsch*, New York Supreme Court, March, 1884, it was held that “ An agreement by which a person participates in the profits only of a business renders such person a general partner as to third persons.”

State v. Frew.

An arrangement by which one person is to share the profits of a business with another does not make him a general partner in any such sense as to deprive him of his right to certain additional specific compensation which has been agreed upon. *Hamper's Appeal*, 51 Mich. 71,

STATE V. FREW.

(24 W. Va. 416.)

Contempt — constructive — libel on judges.

A publication in a newspaper when and where a court is sitting, referring to a case pending therein, and charging the judges with having in a political caucus advised the action out of which the case arose, and with having pledged themselves to the caucus to adjudge its action legal, and to decide the case before an approaching political convention, is a contempt which may be summarily punished as "misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice."

PROCEEDINGS for contempt. The opinion states the facts.

John A. Hutchinson and *W. P. Hubbard* for respondents.

JOHNSON, President. It is claimed in the answers, that the proceedings in this case are irregular; that the rule is too vague and indefinite and ought only to have issued upon affidavit. There is no sufficient irregularity in the proceedings here that would justify the court in discharging the rule, as clearly appears by the opinion of brother Snyder, which meets my entire approval. The main question, the one most discussed at the bar is: Has the court the power to punish summarily a constructive contempt of the character described in the rule? It is insisted that the power to punish for contempt is limited by sections 27 and 28 of chapter 147 of the Code. The said two sections are as follows:

"27. The courts and judges thereof may issue attachments for contempts and punish them summarily only in the cases following: First, misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice; secondly, violence or threats of violence to a judge or officer of the court or to a juror, witness, or party going to, attending or return-

State v. Frew.

ing from the court, for or in respect of any act or proceeding had, or to be had in such court ; thirdly, misbehavior of an officer of the court in his official character ; fourthly, disobedience or resistance of any officer of the court, juror, witness, or other person to any lawful process, judgment, decree or order of the said court."

"28. No court shall, without a jury, for any such contempt as is mentioned in the first class embraced in the preceding section, impose a fine exceeding fifty dollars or imprison more than ten days. But in any such case the court may impanel a jury (without an indictment or other formal pleading), to ascertain the fine or imprisonment proper to be inflicted, and may give judgment according to the verdict."

It is also insisted that the legislature had the right thus to limit the powers of courts over the subject of contempts and entirely prohibit the courts from punishing summarily such a constructive contempt as is set up in the rule. Counsel cite the following authorities to sustain this position : *Storey v. People*, 79 Ill. 48 ; s. c., 22 Am. Rep. 158 ; Whart. Pl. & Pr., §§ 957-961 ; Trial of Judge Peck, pp. 87, 91, 92, 295, 400, 426 ; Const. of State, arts. 3, 6, § 39 ; *Ex parte Bollenan and Swartout*, 4 Cranch, 93 ; *Ex parte Hardy*, 68 Ala. 303 ; *State v. Woolley*, 11 Bush, 95 ; *Whittem v. State*, 36 Ind. 196 ; 20 Am. Law. Reg. 433 ; *United States v. New Bedford Bridge*, 1 Wood. & M. 440 ; *State v. Galloway*, 5 Cold. 326 ; *Ex parte Hickey*, 4 Sm. & M. 776 ; *People v. Yates*, 6 Johns. 337 ; *Hummell's case*, 9 Watts, 431 ; *Wheeling v. B. & O. R. Co.*, 13 Gratt. 40 ; *Lindsay v. Com'rs*, 2 Bay, 61 ; *Hoover v. Wood*, 9 Ind. 286 ; *Ireland v. Turnpike Co.*, 19 Ohio St. 373 ; *State v. Sauvinet*, 24 La. Ann. 119 ; *Hill v. Crandall*, 52 Ill. 70 ; *Lewis v. McElvain*, 16 Ohio, 347 ; *Ex parte Schenck*, 65 N. C. 353 ; *Weaver v. Hamilton*, 2 Jones L. 343 ; *In re Daves*, 81 N. C. 72 ; *In re Walker*, 82 id. 95 ; *Cromartie v. Com'rs*, 85 id. 211 ; *Dunham v. State*, 6 Iowa, 245 ; *State v. Anderson*, 40 id. 207 ; *Ex parte Edwards*, 11 Fla. 185 ; *Stuart v. People*, 3 Scam. 395 ; *Batchelder v. Moore*, 42 Cal. 412 ; *Rutherford v. Holmes*, 5 Hun, 317 ; *Newton v. Com.*, 1 Grant Cas. 453 ; *Middlebrook v. State*, 43 Conn. 258 ; s. c., 21 Am. Rep. 650 ; *Deskin's Case*, 4 Leigh, 685.

The case in 79 Illinois was a proceeding against Storey for contempt of court and publication of certain articles in the *Chicago Times* reflecting upon the action of the grand jury in finding indictments against him in the said court. The court below found

State v. Frew.

him guilty and sentenced him to imprisonment in the county jail. To this judgment he obtained a writ of error. Mr. Justice SCHOLFIELD, in delivering the opinion of the court, after referring to the fact that there was no allegation, that the publication of the articles is calculated to prevent the obtaining of a competent petit jury to try the respondent on the several indictments, or that the judge, whose duty it will be to preside during such trial, will in anywise be affected thereby in the discharge of his duty, said:

[Omitting extracts.]

The court held that the constitutional provision, "that every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense," applies to words spoken or published in regard to judicial conduct and character.

I do not understand this case as overruling *People v. Wilson*, but it does dissent from the broad ground taken by some of the judges in that case. It is true that Wharton in his Criminal Pleading and Practice takes the ground that a contempt of the character now under consideration cannot be summarily punished. But Bishop (2 Crim. Law), § 259, takes an opposite view of the question. In the celebrated case of Judge Peck there was nothing decided, as I understand it, except that the Senate of the United States believed that the action of the judge was an error of judgment. It seems to me apparent that Lawless was not guilty of a constructive contempt unless a dignified criticism of the opinion of the court is such contempt; a position that would not be taken by any court.

In *Woolley's* case, 11 Bush, it was held that the right of self-preservation is an inherent right in the courts not derived from the legislature, and cannot be made to depend upon the legislative will. Whether the legislature might interfere with the manner in which courts protect themselves from insults and indignities, was doubted and left an open question. This was a contempt to the Court of Appeals of Kentucky, and was punished by a fine.

Arnold v. Comm., 80 Ky. 300; s. c., 44 Am. Rep. 480, was a writ of error to a judgment in a contempt case, the contempt having been committed in the presence of the court. Judge PRYOR, in delivering the opinion of the court, said:

[Omitting extracts.]

Whittem v. State, 36 Ind., shows that the legislature in that State has given, if it could give power to the courts to punish either direct or constructive contempts. It seems to me the case of *State v. Galloway*, 5 Cold., properly decides nothing, except that a judgment for contempt by an inferior court could not be reversed. The criminal court of Memphis pronounced judgment of fine and imprisonment upon a charge of contempt against Galloway and Rhea, the editors and publishers of the Memphis *Avalanche*. The alleged contempt was an editorial article published in said paper, purporting to give the particulars and denouncing the judge of the court as guilty of official corruption in discharging upon bail a prisoner indicted in that court for felony. The publication was made a day or two after the discharge of the prisoner on bail. The Tennessee Code provided, that "the power of the several courts of this State to issue attachments and inflict punishments for contempt of court shall not be construed to extend to any except the following cases: The provisions are similar to ours in most respects, but the sixth clause provides in general terms for "any other act, or omission declared a contempt by law." The court said of this clause, "that it was not intended to embrace and did not embrace the vast and undefined scope of contempts at common law, outside of the clauses prescribed by statutory enactments." The court further said, that no writ of error lay to the judgment and a judgment refusing to discharge the prisoner on *habeas corpus* could not be reversed; that the "power of the courts to punish for contempts without appellate supervision, though absolutely essential to the protection, efficacy and existence of the courts, is nevertheless capable of being exercised unwisely and corruptly. Absolute and complete protection or redress against such injudicious or improper exercise of the power is in its nature as to many cases impossible to be given. In the organization and maintenance of government it is impossible to avoid the necessity of reposing powers in functionaries, whose action must be final and inevitable." The court seemed to think that the power of the court in the case before it was improperly exercised, but it was not subject to review.

The case in 4 Smedes & Marshall, is not decided by the Supreme Court of Mississippi, and the opinion there pronounced and so much relied on in the argument before us was the opinion of a single judge of the Supreme Court pronounced in discharging a prisoner on writ of *habeas corpus*. Another judge, under like cir-

State v. Frew.

circumstances, expresses a different opinion in *Ex parte Adams*, 25 Miss. 883, in which he held, that "the right of courts of justice to punish by fine and imprisonment for contempts of their authority is an inherent right pertaining to them, which they can exercise independent of any statute." But in *Watson v. Williams*, 36 Miss. 331, which was heard on appeal, the court held: "The right of punishing contempts by summary conviction is a necessary attribute of judicial power, inherent in all courts of justice from the very nature of their organization, and essential to their existence and protection and to the due administration of justice. It is a trust given to the courts not for themselves, but for the people whose laws they enforce, and whose authority they exercise, and each court has the power for itself finally to adjudicate and punish contempts without interference from any other. The right to punish for contempts extends not only to acts which directly and openly insult and resist the powers of the court, or the persons of the judges, but to indirect and constructive contempts which obstruct the process and degrade the authority of the court."

The court said in *Batchelder v. Moore*, 42 Cal. 412: "The power of a court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and in the manner prescribed by law." It did not then appear that the statute did not confer ample power for the proper protection of the courts, and this authority therefore recognizes the right of the legislature to limit and regulate but not to take away the right of self protection from the courts.

In *Ex parte Schenck*, 65 N. C. 353, it was held that "the act of April 4, 1871, declaring that no attorney who has been duly licensed to practice law shall be debarred or deprived of his license and right to practice, except upon conviction for a criminal offense or after confession in open court, is constitutional; that said act does not take away any of the inherent rights which are absolutely essential in the administration of justice." This case does not overrule *Ex parte Moore* or *Ex parte Biggs*, in 63 and 64 N. C. To these last cases I will refer in another part of this opinion.

In *Walker's case*, 82 N. C. 95, it was held, that it was unlawful to imprison for more than thirty days for a contempt of court, citing the statute. The constitutionality of the act is not discussed,

and it seems to be admitted by the court that the legislature has the right to regulate the power to punish for contempts.

Again *Cromartie v. Com'rs*, 85 N. C. 211, was a construction of a statute without considering its constitutionality; and it was held that "under the act of 1868-9, chapter 117, the court has no power to punish a contempt already committed by an imprisonment of indefinite duration, but it may by proceedings as for contempt coerce obedience to any lawful order by imprisoning the contumacious party, until he shall comply."

Dunham v. State, 6 Iowa, 245, was a writ of error to the judgment of the Circuit Court, punishing for a contempt an editor for a libel on the court during a trial; and the court held, reversing the judgment, that "the publication of articles in a newspaper, reflecting upon the conduct of a judge in relation to cases pending in his court, and which were disposed of before the publication, or the publication of the evidence and arguments of counsel in a case undisposed of, in which there was no rule of court prohibiting such publication, however unjust and libellous the publication may be, do not amount to contemptuous or violent behavior toward the court, under chapter 94 of the Code, nor are they so calculated to impede, embarrass or obstruct the court in the administration of the law, as to justify the summary punishment of the offender under that chapter." In that case the court said: "We are strongly inclined to think however that the provisions of the Code upon this subject must be regarded as a limitation upon the power of the courts to punish for any other contempts. We can conceive of no possible state of case in which the exercise of this power might become necessary for the protection of the court, or the due administration of the law, that is not covered by these provisions. If such a case could by possibility arise, we would not say that by virtue of its inherent power, the punishment might not be inflicted." They admit the right to regulate the power, but not to take away any that is necessary for the courts in properly administering the law.

In *State v. Anderson*, 40 Iowa, 207, it was held, "that the publication by an attorney in a newspaper, criticising the rulings of the court in a case tried and determined prior to the publication, does not constitute contemptuous or violent behavior toward the court, punishable as contempt. Whether the publication if made during the pending of the trial, would justify the court in punishing the writer for contempt, *quære*."

State v. Frew.

In *Ex parte Edwards*, 11 Fla. 174, it was held: "In the absence of any statutory limitation or restriction, the power of the several courts over the matter of 'contempts' is omnipotent, and its exercise in any particular case is not to be questioned by any other tribunal. It is the great bulwark established by the common law for the protection of courts of justice, and for the maintenance of their dignity, authority and efficiency. By our statute the power to punish for 'contempts' is limited to fine and imprisonment, the fine in any case not to exceed \$100 or imprisonment thirty days, and this statute is made to apply as well to courts of equity as to courts of common law. As applicable to Courts of Chancery, the restrictions in the statute must be confined to such acts as are the subject merely of punishment. It never was designed to deprive that court of its ancient authority to enforce its affirmative orders or decrees, or any order or decree, whether affirmative or otherwise, which may be pronounced at the final hearing of the cause." The court says of the power of courts over the subject, p. 186: "This is the great bulwark established by the common law for the protection of courts of justice, and for the maintenance of their dignity, authority and efficiency, and neither in England nor in the United States has this unrestricted power been seriously questioned."

In *Rutherford v. Holmes*, 5 Hun, 317, it is held by the Supreme Court of New York, not the Court of Appeals, which is the court of last resort: "The power to punish for contempt is, in its nature, an exception to the provisions of the Constitution, and it cannot be extended in the least degree beyond the limits which have been imposed by statute." This was a review of a contempt proceeding by a justice of the peace.

In *Middlebrook v. State*, 43 Conn. 257; s. c., 21 Am. Rep. 650; it was held: "The statute is not to be regarded as conferring the power to punish for contempts, but merely as regulating an existing power. The power is inherent in all courts." In delivering the opinion of the court CARPENTER, J., said: "But independently of the statute we think the power is inherent in all courts. A court of justice must of necessity have the power to preserve its own dignity and protect itself. *In re Cooper*, 32 Vt. 257; *State v. Woodfin*, 5 Ired. L. 199; *Stephen's case*, 404. Many other cases might be cited to the same point but it is unnecessary, as we are aware of no authority directly in point to the contrary."

I have reviewed the strongest cases cited by counsel to sustain their position, and deem it unnecessary to refer to their other citations more particularly.

Judge Cooley, in his work on Torts, 424, says: "It has also been held in many cases that the publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court in its relation thereto, made at a time and under circumstances calculated to affect the cause of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session when the publication was made. Such a publication when made however, is a continuous wrong, as much as would be something of a physical nature, planned in advance and so arranged as that its natural and necessary results should be to throw the court into disorder and confusion when its sitting should commence."

In *Spaulding v. People*, 7 Hill, 301, it was said by NELSON, C. J.: "The remedy by indictment is oftentimes found too tardy for the exigency of the case; and hence the law has always authorized the mere summary proceeding by attachment as for a criminal contempt, whereby the offender is arraigned at once upon the charges and the courts of justice more promptly vindicated and sustained. As has been well remarked in reference to this subject, laws without a competent authority to secure their administration from disobedience and contempt would be in vain and nugatory. A power in the courts of justice therefore to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal."

In *Yates v. Lansing*, 9 Johns. 417, PLATT, Senator, said: "A contempt is an offense against the court as an organ of justice; and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor, on indictment, or not. * * * A conviction or indictment will not purge the contempt; nor will a conviction for contempt be a bar to an indictment."

In *Rutherford v. Holmes*, 66 N. Y. 369, it was held: "A court of a justice of the peace has no power to adjudge a person in contempt and to punish him therefor save in the cases prescribed in the statute." Judges ANDREWS and MILLER, dissented. The two dissenting judges must have thought that even a justice of the

State v. Frew.

peace could not be by statute deprived of his necessary power to punish for certain contempts.

In *Matter of Kerrigan*, 33 N. J. L. 344, it was held: "The power to punish by commitment for contempt is a power belonging only to judges of certain courts, and does not arise from the mere exercise of judicial functions. The power so far as it may be exercised by judicial officers is an incident to a court, belonging alike to civil and criminal jurisdiction, but not extending at the common law, below such as are courts of record, recognized in the common law."

In *Cartwright's* case, 114 Mass. 238, GRAY, C. J., said: "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other Supreme Courts as essential to the execution of their powers, and to the maintenance of their authority, and is a part of the law of the land within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights."

In *State v. Matthews*, 37 N. H. 450, it was held, that "the authority to punish contempt is a necessary incident, inherent in the organization of all legislative bodies, and all courts of law or equity."

In *Sturoc's* case, 48 N. H. 428, it was held: "The publication of an article in a newspaper printed and circulated in the place where a court is sitting, reflecting in severe and opprobrious terms on the character of a criminal prosecution then pending in court and standing in order for trial, if the publication is made at a time and in circumstances such as would naturally bring it to the notice of jurors and others who are in attendance upon the court, is a contempt of court and punishable as such by summary process."

In *Morrison v. McDonald*, 21 Me. 550, it was held: "The power to commit for contempts of courts is incidental to all courts of record."

In *Gaudy v. State*, 13 Neb. 445, it was held: "The District Court has authority to punish by proceedings for contempt any person who attempts to corrupt or unlawfully influence jurors in a case pending before the court." It was further held, that "as the proceeding was solely to protect justice from obstruction, the accused is not entitled to a trial by jury."

In *State v. Williams*, 2 Speer, 26, it was held: "The seventh and eighth clauses of the act of 1839, in relation to the office of con-

stable, which prescribe the proceeding by indictment in cases of official misconduct, do not supersede or impair a judge's common-law jurisdiction over the subordinate officers of court, so as to deprive him of the power without indictment of punishing a constable for contempt, or of ordering him to be put under a rule to show cause why he should not be stricken from the roll for official misdemeanor coming under the observation of the judge himself, or which may be brought to his knowledge through official channels. The remedy provided by this act is rather to be regarded as cumulative than exclusive."

In the old case of *Respublica v. Oswald*, 1 Dal. 319, decided by the Supreme Court of Pennsylvania in 1788, it appears from the opinion of McKEAN, C. J., that it was a motion for an attachment against Eleazer Oswald, printer and publisher of the *Independent Gazetteer*. That an action for libel had been instituted in that court, in which Andrew Brown was plaintiff and said Oswald defendant; that a question with respect to bail in the action had been agitated before one of the judges, from whose order discharging the defendant on common bail the plaintiff had appealed to the court; and that Oswald's appeal to the public through his paper, which was the immediate subject of complaint, related to the action then pending before the court. It was contended that the published address was intended to prejudice the public mind upon the merits of the cause, by propagating an opinion that Brown was the instrument of a party to persecute and destroy the defendant; that he acted under the particular influence of Dr. Rush, whose brother was a judge of the court, and in short from the ancient prejudices of all the judges the defendant did not stand the chance of a fair trial. The chief justice said: "Assertions and imputations of this kind are certainly calculated to defeat and discredit the administration of justice. Let us therefore inquire first whether they ought to be considered as a contempt of the court; and secondly, whether the offender is punishable by attachment." The court decided both questions in the affirmative; and the following judgment was pronounced by the chief justice: "Eleazer Oswald, having yesterday considered the charge against you, we were unanimously of the opinion that it amounted to a contempt of the court. Some doubts were suggested, whether even a contempt of the court was punishable by attachment; but not only my brethren and myself, but likewise all the judges of England, think that without this power no court could

State v. Frew.

possibly exist; nay, that no contempt could indeed be committed against us, we should be so truly contemptible. The law upon the subject is of immemorable antiquity, and there is not any period when it can be said to have ceased or discontinued. On this point therefore we entertain no doubt. But some difficulty has arisen with respect to our sentence; for on the one hand we have been informed of your circumstances, and on the other we have seen your conduct; your circumstances are small, but your offense is great and persisted in. Since however the question seems to resolve itself into this, whether you shall bend to the law or the law shall bend to you, it is our duty to determine that the former shall be the case. Upon the whole therefore the court pronounces this sentence: That you pay a fine of ten pounds to the Commonwealth; that you be imprisoned for the space of one month, that is from the 15th day of July next to the 15th day of August next; and afterward until the fine and costs are paid. Sheriff, he is in your custody."

In *Passmore's* case, 3 Yeates, 441, decided by the same court in 1802, it was held: "The publication of a paper to prejudice the public mind in a cause depending is a contempt, if it manifestly refers to the cause though it does not expressly appear on the face of the writing. But however libellous the paper may be, the court can have no cognizance of it in a summary way, unless it be a contempt." In that case the publication related to the plaintiff in a civil suit against said Passmore. SHIPPEN, C. J., said: "However libellous the publication complained of may be, we have no cognizance of it in this summary mode, unless it be a contempt of the court. 2 Atk. 469. But we are unanimously of opinion that in point of law it is such a contempt, and readily concur with Lord HARDWICK that 'there cannot be any thing of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.' 2 Atk. 461. If the minds of the public can be prejudiced, by such improper publications, before a cause is heard, justice cannot be administered. The defendant has set at naught the advice we gave him when we ordered the attachment. He has made no atonement whatever to the person whom he has so deeply injured, and he can only blame himself for the consequences. The judgment of the court is, that the defendant pay a fine of \$50 to the Commonwealth, and be imprisoned in the debtors' prison for thirty days, and afterward until the fine and costs are paid."

On April 3, 1809, the legislature of Pennsylvania passed an act, the second section of which provided, that "publications out of court respecting the conduct of the judges, officers of the court, jurors, witnesses, parties or any of them, if in and concerning any cause pending before any court of this Commonwealth, shall not be construed a contempt of the said court, so as to render the author, printer, publisher, or either of them liable to attachment and summary punishment for the same, etc., but authorizes a proceeding by indictment for the same, and gives the party aggrieved his action at law to recover damages for the injury sustained." No case from Pennsylvania has been cited and none found by us, in which the constitutionality of this act has been declared or even discussed.

In the case of *Hummel and Bishoff*, 9 Watts, 416, a section of the contempt law was construed on writ of error, and it was held the defendants were officers within the meaning of the act of June 16, 1836, restricting the powers of the several courts to issue attachments, and to inflict summary punishments for contempts of court, and affirmed the judgment of the court below, summarily punishing the defendants.

It will be seen that in none of the numerous authorities, which we have cited, has it been expressly held, that it is within the legislative power to so limit the right of the courts of record, as to take from them their inherent power to punish summarily constructive contempts, when the exercise of such right is essential to the administration of justice. But in a number of cases it has been held that the legislature cannot impose such limit.

In *Hughes v. People*, 5 Col. 436, it appears that the Code of Colorado provided, that "the following acts or omissions shall be deemed a contempt" (then follow the classes). The court evidently did not regard the contempt as coming within the provisions of the statute; and STONE, J., in delivering the opinion of the court, said: "Aside from the inapt language and faulty manner of expression, these enumerated causes of legal contempt in the Code are much narrower than the common law." Then after quoting the language of BREESE, J., in *Stuart v. People*, 3 Scam. 395, that the language of the statute might with great propriety "be regarded as a limitation upon the power of the court to punish for any other contempt," further says, "while we do not think upon the whole case this language intended to declare a doctrine so broadly as is contended for it, there are on the other hand ample

State v. Frew.

authorities for the more reasonable doctrine, that such a statutory enumeration of causes as is found in our Code, when applied to the ever varying facts and circumstances, out of which questions for contempt arise, cannot be taken as the arbitrary measure and limit of the inherent power of a court for its own preservation, and for that proper dignity of authority which is essential to the effective administration of justice."

In *Woolley's* case, 11 Bush, 95, LINDSAY, J., said: "We will not in this case determine, whether under the Constitution the legislative department under the guise of regulating proceedings in cases of contempt can take from the judiciary the power to preserve its independence and equality by protecting itself against insults and indignities. The right of self-preservation is an inherent right in the courts. It is not derived from the legislature and cannot be made to depend upon legislative will. The power of the legislative department to interfere with the manner in which the judicial department shall protect itself against insults and indignities is denied by the Supreme Court of Arkansas (*State v. Morrill*, 16 Ark. 324), and doubted by the Supreme Court of the United States. *Ex parte Robinson*, 19 Wall. 510. It remains an open question in this State and we intend in this case to so leave it."

In *People v. Wilson*, 64 Ill. 195, it was held that "the power to punish for contempts is an incident to all courts of justice independent of statutory provisions; that the statute which declares that the Supreme Court 'shall have power to punish contempts offered by any person to it while sitting' merely affirms a pre-existent power, and does not attempt to restrict its exercise to contempts in the presence of the court, but leaves them to be determined by the principles of the common law. And if a statute should be regarded as a limitation upon the power of the court to punish for any other contempts than those committed in its presence, yet in this power would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court." And the Supreme Court of Illinois in that case punished by attachment the publisher and editor of a newspaper for publishing in a city of the State, remote from where the court was sitting, a charge of bribery against the court on account of its action in a case pending on a writ of error.

In *Ex parte Moore*, 63 N. C. 397, the Supreme Court of North Carolina asserted the right to punish summarily for contempt an attorney at its bar for a publication of an article in a newspaper reflecting on the court and published when the court was not in session. And the court held: "A court has power to require the members of its bar to purge themselves from a charge of contempt incurred by their publishing over their names in a newspaper libellous matter, directly tending to impair the respect due to its members." The objectionable language used toward the court was as follows: "The judges of the Supreme Court, singly or *en masse*, moved from that becoming propriety so indispensable to secure the respect of the people, and throwing aside the ermine, rushed into the mad contest of politics under the excitement of drums and flags * * * and will yield to every temptation to serve their fellow-partisans, and are unfit to hold the balances of justice."

In the case of *State v. Morrill*, 16 Ark. 384, the court directly holds, that a statute taking away the right of a court summarily to punish for a constructive contempt is unconstitutional. The court in an able and elaborate opinion by ENGLISH, C. S., held, that it had the constitutional power to punish as for contempt for the publication of a libel made during a term of the court in reference to a case then decided, and imputing to the court officially bribery in making the decision; "such power being inherent in courts of justice, springing into existence upon their creation as a necessary incident to the exercise of the powers conferred upon them," and that "the legislature may regulate the exercise of but cannot abridge the express or necessarily implied powers granted to this court by the Constitution;" that the statute, Digest, chapter 36 section 1, "so far as it sanctions the powers of the courts to punish as contempt the acts therein enumerated, is merely declaratory of what the law was before its passage;" that the prohibitory clause is entitled to respect as an opinion of the legislature, but is not binding on the courts; that "by the common law the courts possessed the power to punish as for contempt libellous publications upon their proceedings, pending or past, upon the ground that they tended to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees so essentially necessary to the good order and well-being of society, and most effectually obstructed the free course of justice;" that "when the Supreme Court was created by the Constitution and certain judicial powers conferred upon it,

the power to punish contempts of its authority was impliedly given to it as a necessary incident to the exercise of its express powers."

In *Dandridge's* case, 2 Va. 408, it appears that the Circuit judge being about to enter the court-house for the purpose of opening court, Dandridge, who was standing at the door, grossly insulted him, charging him with corruption and cowardice in delivering an opinion in a case at a previous term of the court, in which Dandridge had some interest. Proceedings for contempt having been instituted against him, the case was adjourned to the General Court of Virginia on account of its importance, novelty and difficulty. By the General Court the whole doctrine of constructive contempt is discussed thoroughly and ably, and the conclusion was reached that the conduct of the defendant was punishable as a contempt.

It is conceded here in the argument that it is not in the power of the legislature to take from courts the inherent power possessed by them to punish contempts in the face of the courts; but it is insisted that the legislature may at will deprive the courts of the power to punish summarily constructive contempts such as that described in the rule. At common law, as clearly appears in *Dandridge's* case, the power to punish for such constructive contempts was as much an inherent because a necessary power, as to punish for direct contempts; and as we have seen, this position is abundantly sustained by authority. Does not the reason for the existence of the power as much obtain in the one case as the other? If an attorney at the bar should charge the court in its presence with being bribed to decide the cause under argument against his client, no one would doubt for a moment the right of the court to summarily punish him for such contempt. Why? Not because he had interrupted the court in its dispatch of business; for there was no interruption in the hearing of the cause. The court would have the right to punish the offender, because the language used was designed and calculated to destroy the confidence of the people in the court, and to degrade the court in the opinion of the public, and to corrupt the streams of justice. In such case the court would be wanting in respect for the people, whose servant it is, if it did not summarily punish the offender. There may not have been a half dozen persons in the court-room to hear the charge of corruption against the court, yet it would be not only the right but the duty of the court to punish such a contempt. Is it not absurd to say, that if the same attorney had published the

same charge in a newspaper printed in the town where the court was sitting, which was read by thousands, aye, read in the courtroom within view of the court it was designed to affect, he would not be guilty of a contempt of court, for which he should be summarily punished? If a suit for libel would be an ample vindication, as is stated by the judge, who delivered the opinion in *Stuart v. People*, 3 Scam., in the one case, a slander suit would be in the other. Such a suggestion is disgusting to a man of honor. It will be a sorry day when the practice shall obtain among judges of the court of last resort, who hold the dearest interests of the people in their hands, when in their judicial capacity they may be grossly libelled, to leave their high positions and go before a jury in a libel suit, be subjected to the coarse criticism of defendant's counsel, and if they succeed in their suit, have it cast in their teeth, that they were influenced by sordid motives. Who would have any respect for a judge who would pursue such a course? Would he not under such circumstances deserve the contempt of every good citizen? Besides, what right would he have individually to recover damages for a wrong committed against him in his judicial capacity, for an injury done the people in his person? In such cases the individual must always be separated from the judge. The court has no right to punish as for contempt one who libels an individual, who happens to be the judge; but it is a contempt of the court, as such, and an insult to the people represented by the court, which alone the court can punish as such. Scarcely less repulsive to all sense of judicial dignity is the suggestion that the judge should play the role of prosecuting witness in the trial of an indictment for libel. If that day shall ever come, when such shall be the only protection left to courts of justice against publications affecting their judicial integrity, none but the base and vicious can be expected to occupy judicial position.

It was well and truly said by the High Court of Errors and Appeals of Mississippi in *Watson v. Williams*, 36 Miss. 341: "In this country all courts derive their authority from the people, and hold it in trust for their security and benefit. In this State all judges are elected by the people, and hold their authority in a double sense directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and law emanating from the people, which the judges sit to exercise and enforce. Contempts against these courts,

State v. Frew.

in the administration of the laws, are insults offered to the authority of the people themselves, and not to the humble agents of the law whom they employ in the conduct of their government. The power to compel the lawless offender against decency and propriety, to respect the laws of his country and submit to their authority (a duty to which the good citizen yields hearty obedience without compulsion), must exist, or courts and laws operate at last as a restraint upon the upright who need no restraint, and a license to the offenders whom they are made to subdue."

We are well aware that the trust reposed in us to protect the people's court from degradation is as delicate as well as a sacred trust. The power claimed, it is said, is arbitrary and liable to abuse. That is no reason why the power should not exist and be reposed somewhere. The few instances in which this power has been used during the last century show that it was wisely placed and may be safely left in the hands of the courts. It is well established by the authorities, that the power is inherent in courts of justice to summarily punish constructive as well as direct contempts. And in this country, where the courts are in the divisions of power by the Constitutions of the several States constituted a separate and distinct department of government, clothed with jurisdiction, and not expressly limited by the Constitution in their powers to punish for contempt, the inherent power that is thus necessarily granted them cannot be taken away by the legislative department of the government. The Supreme Court of Arkansas in 16 Ark. 390, said: "The legislature may regulate the exercise of but cannot abridge the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances, to be found in the organic frame-work of both Federal and State institutions, and a favorite theory in the governments of the American people."

It is not claimed that the power to punish contempts need be exercised in this country to the same extent allowed by the common law. Mr. Justice SCOTT, in *Neel v. State*, 4 Eng. 263, said: "It has never been contended in this country, that the common law, although it is our birthright, and in force among us, without express recognition by our Constitution and laws, was ever actually in force in all its length and breadth, but only to an extent that was

not wholly inconsistent with these great principles, upon which our free institutions, purely American, have been reared and maintained. So these doctrines, which we are considering (powers of courts to punish contempts), in being recognized by the courts must be regarded as having received a corresponding abatement of those of its lineaments which are at open war with the nature and character of our Constitution, and the actual state of things among us, under its legitimate operation, or it would be an exotic that could not germinate in our soil." Therefore courts will tolerate the regulation of the power, so that the legislature does not by such regulation substantially destroy the efficiency of the court.

The courts must have just enough power and will exercise it for their own protection, and they want and demand no more. Whether or no the legislature in its regulation has left sufficient power for the purpose, the court, which is called to exercise it, must be the sole judge, unless its judgment may be reviewed, and in that case the court of last resort would be the exclusive judge. There is no disposition in the courts to seek opportunities to exercise this power; and it will not be exercised, unless there is a necessity for it. When a judge remembers that he has no right to avenge in this manner individual wrongs, but only an injury to the court, the people's court, it becomes a matter of stern and inflexible duty from the performance of which under his official oath he dare not shrink. For he well knows, that as the ermine was spotless when he put it on, the people expect him to leave it as untarnished for his successor.

We have thus far been considering whether the legislature has the right to limit the power of courts created by Constitutions. It is very different as to its power over courts of its own creation.

In *Ex parte Robinson*, 19 Wall. 505, it was held that Congress had the power to limit the right of the Circuit and District Courts of the United States to punish contempts because they were the creations of Congress. Mr. Justice FIELD, in delivering the opinion of the court in perfect accord with the authorities we have cited, said: "The power to punish for contempts is inherent in all courts; its existence is essential to the promotion of order, in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence, and invested with jurisdiction over any subject

State v. Frew.

they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2, 1831. The act in terms applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is therefore to them the law specifying the cases in which summary punishments for contempts may be inflicted."

We have already seen that the power of courts created by the Constitution to punish contempts is an inherent power without which they might wholly fail in the object of their creation. When a court is created and exists by some legislative act, it follows that the power which creates must confer, and can take away its jurisdiction at its pleasure. As a consequence of this, the same power can define contempts against, and prescribe the measure and mode of punishment, or even withhold altogether from such court, the power to punish the same. These are not questions of power but of expediency only, and of this the legislature must judge. But if the court be created, and its jurisdiction conferred by the Constitution, then the power to punish for contempts inherent in such court also exists by virtue of the Constitution, and in the absence of any constitutional provision authorizing the legislature to do so, it cannot deprive such court of that power.

It is contended however that the General Court of Virginia in the case of the *Commonwealth v. Deskins, etc.*, reported in 4 Leigh, decided that the act of the general assembly, passed on April 16, 1851, defining contempts, and limiting the power of the courts to punish the same, deprived the courts of the power to punish summarily any contempts, except those therein enumerated.

[Omitting this discussion.]

Is the publication complained of here a contempt to this court? It seems to us that the books do not furnish a clearer case of contempt. It is a contempt, because it charges three of the judges of this court, acting in their judicial capacity, with an offense, which if true is just ground of impeachment; with an offense calculated to degrade the court and destroy all confidence of the people therein. If to charge three of the judges of this court with having attended

a political caucus and advised a certain action by the same, coupled with the promise, that as a court they would sustain the action of the caucus, and then in pursuance of that pledge made more than a year ago, the same judges as a court were about to decide the case then before them as the caucus desired, is not a contempt of the court then it seems to us that nothing would constitute a contempt. If to charge a court or a majority of its members with having prostituted their high and sacred trust to base political purposes is not a contempt, then we may truly say that such a thing does not exist. The article on its face shows moreover that it was intended to influence the decision of the court in the cause, to which reference is therein made, and which was then pending, or to prevent the court from deciding it at the present term. That it had no such effect is not material, so far as the contempt is concerned. It first says: "The campaign is shaping itself. It leaks out that the Supreme Court of Appeals is to be brought to the rescue in a decision affirming the unconstitutionality of the exemption act, and declaring the supplemental assessment order to be lawful and right. This is in effect what was promised by the three Supreme Court judges to the democratic caucus before the order was issued." Again: "Three out of four judges of the Supreme Court told the democratic caucus more than a year ago to go ahead and rely on the backing of the court." This is a charge of infamy against the court. But it is further charged, that the decision would be hastened by the court, against the interests of one of the candidates for nomination for governor. Thus again charging the court with using its powers for political purposes. Then comes the clause, the manifest intent of which was to compel the court to decide against its supposed convictions or not now decide at all, and charging it with being capable of deciding a cause, not from its convictions, but as convenience or political desires might dictate. It says: "Of course it was not intended that the purpose of the court should be made public, and publicity may induce the court to change its mind just to show that somebody has been taking liberties with the text and misrepresenting the court. We shall see what we shall see."

[Omitting minor questions.]

It is the unanimous judgment of the court, that an attachment issue against John Frew and C. B. Hart, returnable forthwith.

Judgment affirmed.

HORNBOOKS V. LUCAS.

(24 W. Va. 498.)

Landlord and tenant — distress — taking note for rent.

A landlord, taking the negotiable note of his tenant for rent, may not distrain or sue for the rent until the maturity and non-payment of the note.

ACTION on bond on distress-warrant. The opinion states the facts.

W. P. Hubbard, for plaintiff in error.

D. Peck, for defendants in error.

GREEN, J. The only question really involved in this case: Can a landlord, who either before or after rent is due takes from his tenant a negotiable note for the rent, payable on time, before this negotiable note becomes due distrain his tenant for the rent?

[Minor matter omitted.]

But though it is clear, that the acceptance of these negotiable notes of Lucas, the tenant, by the landlords did not extinguish the rent due from Lucas, yet it seems to me, it did operate as a suspension of the right of his landlords to enforce the payment of this rent in any manner, till after the notes became due and payable. The cases in our own State above cited show clearly, that if instead of rent the claim against Lucas had been due by a simple contract, whether in writing or not, the simple taking from him of notes payable at a future time for the debt due would have operated as conditional payment and have therefore suspended the enforcement of such debt, till the notes taken for it were due and payable, an agreement being implied from the mere acceptance of the note of a debtor payable at a future time, that the creditor would extend the time of payment of the debt, till the note taken by him should become due and payable. But of course to make this implied agreement binding on the creditor, there must be some consideration to support it. This is not expressly stated in these cases in our courts generally; but in every case where the taking of a note of the debtor payable at a future time has been considered by our courts as a conditional payment of a previous debt, that is, as operating as an agreement on the part of the creditor to suspend his

right of suit till the note taken by him for his debt is due, there has always been some consideration to support this implied agreement. Take for instance the last of these West Virginia cases, *Bank v. Good*, 21 W. Va. 455, point 3 of syllabus. This court decided in that case: "The giving of a new note for an old one which had become due — the amount and maker of the two notes being the same — will not be treated as a payment or extinguishment of the old note or the pre-existing debt, unless the parties so expressly agree; but it will be regarded merely as an extension of credit." But if we look at the case, in which it was thus held that the giving of the new note was an extension of the credit by implication, it will be seen (see p. 456) that the interest on the new note was paid in advance and was the obvious consideration, which moved the creditor to grant such extension of credit to the debtor. Had not this or some other consideration existed, I presume this extension of credit by the taking of a new note payable at a future time would have been regarded as rendering this agreement to extend the credit a *nudum pactum*; and the creditor could have sued on the old note or debt, before the new note became due and payable.

The same conclusion, it seems to me, would follow, if a new bond was given for an old bond, the amount of the bond and the obligor or obligors in it being the same as in the old bond, and the new bond being payable on time and not bearing interest till it fell due. In such case, as the obligor or obligors in the new bond would be the same and would be bound in the same manner, so that the giving of the new bond could not possibly prejudice the obligors in it nor benefit the obligee; the implied agreement to extend the credit on the old bond would, it seems to me, be a *nudum pactum* and void, and therefore the old bond or debt might be sued upon before the new bond was payable. But this could not be successfully done, if the new bond bore interest from its date; for this would be a sufficient consideration for the agreement to extend the credit. If however we suppose, that instead of a new bond there was given a negotiable note, executed by the obligor in the old bond and given for the same amount as the bond and at the time the bond fell due, payable at a future time without interest from its date, and no interest was paid in advance, still it seems to me the bond could not be sued on, till the negotiable note became payable and the maker failed to pay it. For the taking of the note would be an extension

Hornbrooks v. Lucas.

of credit to the obligor in the bond, and the implied agreement to extend this credit would be supported by a valuable consideration, namely the change in the character of the obligation which would be produced by the taking the negotiable note of the obligor in the bond. Any thing which confers benefit on the party to whom the promise is made, or loss or inconvenience on the party promising is a valuable and sufficient consideration to support any promise. It is a matter of no sort of importance what is the amount of inconvenience on the one side and of advantage on the other. It is sufficient in such case that one or the other existed in any degree however slight. See *Uhler v. Applegate*, 26 Penn. St. 140. The part payment of a debt in that case but a single day before it was due was held a valuable consideration to sustain a promise by the creditor; but if this part payment had been made the next day it would have been no consideration. The same was held by the whole court in *Bantz v. Basnett*, 12 W. Va. 773, point 3 of the syllabus, and pages 850-853. In that case the part payment was made only two days before the debt was due. Now the giving of a negotiable note in lieu of a bond is or may be a benefit to the creditor and a possible inconvenience to the debtor. It gives to the creditor a different obligation from the one he held, and the new obligation is a commercial one, upon which he may raise money. The debtor too by giving a negotiable note instead of a bond may subject himself to inconvenience. If he fails to pay his negotiable note promptly, he renders himself liable to be protested, and may then lose his credit to an extent that the non-payment of his bond promptly would not produce. Moreover if the negotiable note should be negotiated before it falls due, all of the maker's defenses, if he had any against his creditor, would be forever gone; nor could he acquire any offsets against such negotiable note, though he could against the bond, even after it was due and payable. See *Ikin v. Brook*, 1 B. & A. 124; 20 Eng. C. L. 357.

If instead of a bond the creditor had a judgment against the debtor, and the debtor gave to the creditor a negotiable note for the amount of the judgment payable at a future time and not bearing interest till it was payable, I presume that the creditor would nevertheless have a right before the negotiable note became payable to issue an execution on his judgment and to enforce its payment. For this implied agreement on his part to give credit on his debt till the negotiable note was payable would, it seems to

me, be a *nudum pactum* and therefore null and void. Its nullity however does not, as is claimed, result from the fact that a judgment is of higher dignity than a negotiable note, but it results from the fact that the giving of the negotiable note is of no possible benefit to the creditor and no injury or inconvenience to the debtor. For after the negotiable note becomes due all that the creditor could get would be a judgment for the amount against his debtor, and that he already has. Nor is the debtor inconvenienced, because though he could not make any defense against the negotiable note, if assigned before it was payable, yet in this he loses nothing, as he could make no defense against a judgment already rendered.

But if the claim of the creditor was a claim for rent, though it be a debt of higher dignity than a negotiable note, yet it seems to me the giving for such rent by the creditor of his negotiable note for the amount of the rent, the note being payable at a future day, though it would be no satisfaction of the rent, yet it would operate to suspend the party's right by distress or otherwise to enforce the rent, till the negotiable note should become due. This was expressly decided in the case of *Judge v. Fiske*, 2 Speer, 436. That case was like the one before us excepting only that the interest on the rent till the negotiable note became due was added in the giving of the note. But this circumstance could make no difference, as the reasoning of the court was in no manner influenced or affected by this circumstance. The court in that case held, that the giving of a negotiable note, payable on time for a precedent debt, would operate as an implied agreement by the creditor to extend a credit to the debtor in consideration of the debtor's executing his negotiable note for the amount of the debt, and that the giving of such a note would suspend the right of the creditor to distrain or enforce his rent, just as it would suspend the right of a creditor to enforce any other debt.

The counsel for the defendants in error insists that this position is in conflict with *Cornell v. Lamb*, 20 Johns. 407, and *Davis v. Gyde*, 29 E. C. L. 166 and other cases which I have cited on page 497. But he relies especially on the two cases above named. In the first of these cases, *Cornell v. Lamb*, 20 Johns. 407, it was decided: "The acceptance of a bond for rent is not an extinguishment, even when the rent was reserved on a parol lease." This decision, it seems to me, does not touch the question in the case before

us. It is not even claimed that the giving of the negotiable note in this case extinguished the rent, but only that it suspended the collection of the rent, till this negotiable note should become due, and this, for the reasons I have stated, I think it did. In the other case principally relied on by the counsel for the defendant in error, *Davis v. Gyde*, 2 Ad. & Ell. 623 (39 E. C. L. 166), it was decided as set forth in the syllabus: "A promissory note, given and received for rent, does not extinguish the claim for such rent, which is a debt of higher dignity than that arising from the note. Nor does the receipt of such note of itself suspend the right of distraining. If the giving of such note be pleaded in bar to an avowry, it must be shown that the note was accepted in satisfaction; or that by special agreement or from other circumstances pleaded it suspended the right of distress." Let us consider in what this decision varies from the views we have expressed, or from those of the South Carolina case which I have referred to, *Judge v. Fiske*, 2 Speer, 436. In so far as it holds that a negotiable note given and received for rent does not extinguish the claim for such rent, they are in perfect accord; and in so far as it decides that the giving and accepting of such negotiable note for rent due may by special agreement suspend the right of distress, it is also in perfect accord with my view and with the South Carolina case. The South Carolina case decides expressly that such an agreement is supported by a sufficient consideration and is not a *nudum pactum* and void. The English case in effect decides the same thing, for if such express agreement operates to suspend the right of distress, it cannot be a *nudum pactum* and void. In other words, the English case in effect decides that such express agreement is sustained by a sufficient consideration. The South Carolina case points out what this consideration is, while the English does not. In what then do the two cases differ? In nothing but in what is regarded as sufficient evidence of such an agreement. The English case holds, that because of the high dignity of a debt due as rent and the great favor shown to the right of distress, the courts will not consider that an agreement to suspend this right of distress should be inferred simply from the landlord taking from his tenant, after the rent is due, a negotiable note for the rent payable at a future time. The South Carolina case on the other hand says, that such an agreement to suspend the collection of rent by distress or otherwise must necessarily be implied from the taking

from the tenant a negotiable note payable at a future time. This is all the difference between them. To my mind the position taken in the South Carolina case is right.

What possible object could the landlord and tenant have, the one in taking and the other in giving a negotiable note payable at a future day, except simply to extend the time in which the rent was to be paid on the tenant binding himself to pay it by giving for it a commercial security? We have seen that it is perfectly well settled in this State, that the giving by the debtor of a negotiable note to his creditor payable at a future time would necessarily be interpreted as an extension of time to the debtor. And it seems to me clear that we cannot interpret otherwise the agreement of the parties simply from the fact that the precedent debt was rent. It does not seem to me that the English court was justified in making this distinction. It is based on the peculiar favor in which the right of distress is held in England; but if such a distinction exists in England for this reason, it ought not to exist in this State, where so much peculiar favor is not extended to the right of distress, as is extended to it in England. Here the tenant after the levy of a distress and after the giving of a forthcoming bond may still dispute the claim for rent or even get up offsets against it, when judgment is asked on the forthcoming bond. Why then should he not be permitted to defend himself by proving that his landlord had agreed to suspend his right of distress? And why may he not prove this just as any debtor would be allowed to prove in any action for any debt, that the creditor had agreed for a consideration to suspend his action? And why may not this agreement on the part of the plaintiff to suspend his action be proven by the tenant in the same manner that it can be proven by any other debtor, that is, by simply proving that the plaintiff had taken of the defendant a negotiable note for the rent or debt payable at a future time, which had not expired, when the plaintiff instituted his proceedings? I cannot see why this mode of establishing this defense should not be available to a tenant as well as to any other defendant.

[Minor matter omitted.]

Reversed.

White v. Stender.

WHITE V. STENDER.

(24 W. Va. 615.)

Injunction — against tax sale.

The sale of personal property for unpaid taxes will not be restrained unless it is of peculiar value to the owner, and it is manifest that great injury would result from the sale. (*See note, p. 287.*)

SUIT for injunction. The opinion states the case. The injunction was awarded below.

W. S. Wiley, for appellant.

J. W. McCoy and *T. P. Jacob*, for appellees.

SNYDER, J. Injunction suit brought November 15, 1880, in the Circuit Court of Wetzel county by F. M. White and wife against John Stender, sheriff of said county, to restrain the sale of personal property levied on by him to satisfy certain taxes and to inhibit him from collecting said taxes from the plaintiffs. The injunction having been awarded, the defendant demurred to and answered the plaintiffs' bill, depositions were taken by both parties, and the court having overruled the demurrer, the cause was finally heard January 26, 1882, when the court entered a decree perpetuating the injunction with costs to the plaintiffs, and the defendant appealed to this court.

The appellant assigns as error that the Circuit Court improperly overruled his demurrer to the plaintiff's bill. This presents to us an important question. The material allegations of the bill are, that the plaintiffs are the owners in fee of a tract of seventy-six acres of land in Wetzel county upon which they reside and to which they derived title as follows: About the year 1867, Cæsar Matheny settled upon said land claiming it as his own and paying taxes thereon, that seven or eight years thereafter Matheny sold it to Milton Owens who went into possession and afterward, on November 13, 1876, Owens by deed of that date conveyed the same to the plaintiffs who then went into possession and have so continued ever since; that said seventy-six acres are within the boundaries of a large tract of land, known as the "Norris land," but have been held adversely to the owners of the large tract for

more than ten years; that the defendant who is sheriff of the county, by virtue of a tax bill held against the owners of said large tract, has "levied on plaintiffs' property, and has advertised the same for sale to satisfy said tax bill," the said taxes being for the year 1879, and amount to about \$150 and the prayer is for an injunction to restrain the sale of said property and inhibit the collection of said taxes from the plaintiffs and for general relief.

It will be noticed that this bill makes no allegation of irreparable damage from the sale of the property levied on, nor that the property is of peculiar value or of any special kind; in fact, it does not mention the character of the property levied upon or describe it in any manner. The question then presented by this demurrer is simply whether an injunction will be entertained to prevent the sale of personal property for taxes which in its nature has no peculiar value in the estimation of the owner, and where there is no claim that consequential or collateral damages will result from the sale?

This court in *Lewis v. Spencer*, 7 W. Va. 689; s. c., 23 Am. Rep. 619, sustained an injunction to the sale of a horse levied on for taxes when the bill averred that the said taxes had been fully paid. In that case PAULL, J., in delivering the opinion of the court, conceded that the judicial history of Virginia and of this State furnished no precedent for the question adjudicated in that case. He also admitted that if the levy had been made under an execution, the plaintiff would have been "debarred an entrance into a court of equity for the reason that he may apply to the court whence the execution issued and have the wrong corrected." *Morrison v. Speer*, 10 Gratt. 228. He made a distinction between a levy under an execution and a levy for taxes, and to sustain the remedy by injunction in the latter case, while he admitted it would not lie in the former, he seemed to rely on section 2 of chapter 158 of the acts of 1871, which declares that no court shall enjoin the sale of any real estate for taxes unless it be averred in the bill that all taxes and levies assessed thereon have been paid. He says: "This would seem to imply that in regard to real estate, at least, that where this allegation is made such injunction may be awarded; and no sufficient reason is perceived why the same course may not be pursued in regard to personal property, where a sale, as we have seen, may also result in great inconvenience to the citizen." 692.

It will thus be seen that in that case importance was very evi-

White v. Stender.

dently given to the statute and the inconvenience which might result to the citizen. But in the case before us neither of those considerations has any application. The statute denies the authority of any court to enjoin the sale unless the bill alleges that all taxes and levies assessed on the property have been fully paid. In this case there is no allegation or pretension that the taxes sought to be collected have been paid. The injunction is asked on a ground which admits the taxes are unpaid. Nor is there any averment that any inconvenience would result to the plaintiffs from a sale of the property levied on which could not be fully compensated for in damages in an action at law against the sheriff, if the sale was illegal. So that if we regard *Lewis v. Spencer* sound law, it does not follow that the injunction should be sustained in this case. But as that case is not very fully reported, and therefore we cannot say that it is not warranted by special facts, still if it can be understood as holding that in every case, and without any peculiar facts and circumstances, equity will enjoin the sale of personal property levied on by an officer for taxes upon the sole ground that the taxes are not due or that the property levied on is not liable for the taxes, I am very much inclined to question its soundness. However I do not think the decision was intended to be so broad in its effects. It must be conceded that the doctrine it announces is a considerable advance upon the more modern decisions of Virginia on analogous subjects, if it is not in positive conflict with some of them. We are certainly not disposed to extend the doctrine of that case so as to make it applicable to cases such as the one now before us.

In *Baker v. Rinehard*, 11 W. Va. 238, the court held, that "A court of equity ought not to grant an injunction to stay the sale of personal property, levied on by a sheriff by virtue of an execution, which property is owned by a third party, when the property is not from its nature of peculiar value to the owner and when its sale will not obviously greatly injure the owner by the consequential damages it would produce."

In that case GREEN, president, in delivering the opinion of the court, after reviewing the cases of Virginia and of this State, including the case of *Lewis v. Spencer*, *supra*, says: "However variant the decisions above referred to may be, none of them hold that where the collateral or consequential damages resulting from the sale of personal property of no peculiar value are trifling, as in this case, a court of equity ought to interfere to prevent a sale by

White v. Stender.

injunction. The law in such case furnishes what the law-books call an adequate and complete remedy; even though in a case where the consequential damages were very great, such remedy at law might be properly considered by a court of equity as incomplete and inadequate, and as furnishing ground for an injunction." 11 W. Va. 265.

The only difference between that case and the one under consideration is, that this is a levy by virtue of a tax-ticket and that was a levy by execution. In both cases the levy was on the property of a third person, which it was claimed by the plaintiff was not liable to levy, and that the levy was consequently illegal. In the case of *Lewis v. Spencer, supra*, a distinction is suggested because in the case of a tax-ticket the officer derives his authority directly from the law, while in the case of an execution the authority is conferred by the court, and while in the latter case the party aggrieved may apply to the court for redress, in the other case he has no such resort. It does not seem to me that this attempted distinction has any logical existence. In either case the ground upon which relief is denied in equity is, that the party has a complete and adequate remedy at law by an action of trespass against the officer for an illegal levy and sale of the property, and not because in the one case he has, and in the other he has not, the right to apply to the court for redress, or to give a suspending bond under the provisions of chapter 107 of the Code. If the jurisdiction to enjoin existed in a court of equity, the giving of a statutory remedy at law would not exclude that jurisdiction.

As a mere question of policy it is less detrimental to allow an execution to be enjoined than it is to permit such interference with the collection of taxes. Executions generally affect merely private interests, while taxes are always for the public use. There are reasons of public policy, founded on the necessity of speedy collection of taxes, which ought to prevent a court of equity from suspending these proceedings except upon the clearest grounds. Hill on Inj. 458; *Douglass v. Harrisville*, 9 W. Va. 162.

[Minor point omitted.]

I am therefore of opinion, for the reasons stated, that the Circuit Court erred in overruling the defendant's demurrer to the plaintiffs' bill. This conclusion makes it unnecessary to consider the answer of the defendant, and proofs, or the questions raised thereon and argued before this court. The decree of the Circuit

White v. Stender.

Court is reversed with costs to the appellant, the demurrer to the bill sustained and the plaintiffs' bill dismissed with costs to the defendant in the Circuit Court.

Reversed and dismissed.

NOTE BY THE REPORTER.— We refer to a few of the leading cases. To the same effect as the principal case, *Susquehanna Bank v. Supervisors*, 25 N. Y. 812; *Western R. Co. v. Nolan*, 48 id. 518; *Powers v. Bowman*, 53 Iowa, 359; *Mayor v. Baldwin*, 57 Ala. 61; s. c., 29 Am. Rep. 712; *Youngblood v. Sexton*, 32 Mich. 406; s. c., 20 Am. Rep. 654.

In *Waterbury Savings Bank v. Lawler*, 46 Conn. 248, it was held that an injunction would not lie to restrain the sale of one man's land for another's taxes. The court said :

" This extraordinary preventive remedy of a court of equity is here invoked upon the ground mainly that the proceedings already commenced by the levy of the tax warrant, if allowed to be completed, would embarrass and becloud the petitioner's title in the land described and diminish its value.

" A cloud upon one's title is something which shows *prima facie* some right of a third person to it. And in this case, as the illegality of collecting the taxes out of the identical property assessed would not appear on the face of the record of the proceedings relative to the laying and collecting of the taxes, a *prima facie* right in a third person who should receive a deed of the land from the tax collector would thereby be created, which would bring the case apparently within an extensive branch of equity jurisdiction. ' But,' as ELLSWORTH, J., remarked in giving the opinion in *Munson v. Munson*, 28 Conn. 586, ' the power is not exercised as a matter of course, nor under any universal rule or principle of law requiring its exercise. It is preventive, as we have said, and very much must depend upon the extent and imminence of the danger threatened, and the view which will be taken of the case by a discreet judge.'

" Although, as suggested, the facts of this case may bring it within the ordinary definition of a threatened cloud upon the plaintiff's title, by creating a *prima facie* right which must be overcome by evidence aliunde, yet there is one element wanting, which in this class of cases always calls most imperatively for equitable interference. I refer to the fact that the evidence to rebut the *prima facie* title is not in this case liable to be lost by the unavoidable death of witnesses, or any other cause likely to happen; for the rebutting facts relied upon, to-wit, the mortgage, the foreclosure, and the date when the plaintiff's title became absolute, are all matters of record and easily obtained. So that ultimately the petitioner will be sure to vindicate his title in a court of law and successfully defend his possession. The injury to be apprehended therefore is by no means irreparable, and the court might well act upon its discretion and deny the injunction.

" But there is a more conclusive reason for refusing the remedy prayed for. The policy of our law has now become quite well settled, that the extraordinary remedy by injunction cannot be invoked to hinder or interfere with a collector of taxes in the discharge of his public duty, because to repeat the lan-

White v. Stender.

guage of the court in *Arnold v. Middletown*, 39 Conn. 406, 'it would interrupt the collection of taxes, one of the most important attributes of the sovereign power, one of its most vital functions. Such an interference might, at times, be dangerous to the safety of the State, and is not to be resorted to except for the most imperative reasons.'

"The case of *Dodd v. City of Hartford*, 25 Conn. 232, was the first in the line of decisions in this State that resulted in establishing the above doctrine. It was there held that a bill in chancery would not lie to restrain the city from enforcing the collection of illegal assessments by the levy of warrants on personal estate. SEYMOUR, J., in giving the opinion, laid some stress on the fact that there was no averment in the bill that the real estate of any of the parties had been or could be levied on, and that the warrant only authorized the taking of personal estate. This may have led the profession generally to assume that the court would recognize a distinction between personal and real estate in the application of the remedy by injunction. But the late case of *Rowland v. First School District of Weston*, 42 Conn. 30, obliterates this supposed distinction. FOSTER, J., in giving the opinion, says: 'We perceive no substantial reason why an injunction should be granted to protect real estate from a levy, that would not apply with equal force to personal estate. If there be any difference, the necessity of protecting personal property would seem to be the greater. A party might be deprived of personal chattels, even under an illegal taking and so be compelled to resort to an action for damages as the only redress. Not so in regard to real estate. There could be no amotion of that, by any levy valid or void.'

"It may perhaps be suggested that there is ground to distinguish the case at bar from the cases referred to, in the fact that the latter are all cases where the applicant for injunction was the tax payer, while in this case it is a third party whose property is to be taken for the taxes of another. Stated in this way the suggestion appears plausible, but on more careful consideration we do not think it furnishes a sufficient basis to distinguish the cases in principle. It is true that the proceedings to collect the taxes in the present case are not against the person assessed. But it should be observed that the proceedings are not against any person, as such, but are against the identical property on which the taxes were assessed, and which is *prima facie* holden for them, and the finding shows that there was no other way by which these taxes could be recovered. This differs therefore from the flagrant case suggested, of proceeding to collect one person's tax out of another or out of property that had no legal connection with the taxes in question. When therefore the tax collector, as in this case, proceeds against either the proper person or the proper estate to obtain the taxes, and adopts the usual and regular methods of procedure, we see no good reason why it does not contravene the rule of public policy to interfere with the proceedings by injunction, as much in one case as in the other."

In *Union Trust Company v. Weber*, 96 Ill. 346, the court said: "The power of the chancellor to restrain the collection of the revenue is one that should never be exercised but in cases where the tax is levied on property exempt from taxation, where it is doubly taxed, where it is levied without any war-

White v. Stender.

rant of law by persons having no power to make the levy, or where a clear case of fraud in making the valuation of the property is shown. But in the latter case the proof must be clear and irresistible, and the injury likely to be produced considerable. It is so eminently just and equitable that every person or corporation receiving protection from the government should each contribute his or its fair and just proportion to its support, that a Court of Chancery should never interpose except to prevent great wrong and injustice. Mere technical objections, or even legal omissions, in assessing property or the collection of the tax, usually do not affect in the slightest degree this strong equitable obligation. If many of the requirements of the law, even those that are important, should be omitted, still the strong equitable duty to pay a tax on property remains. When it escapes, the burden is unjustly and inequitably imposed on others to the extent that property is relieved from its just burden. Again, most if not all of the objections that can be urged in a court of equity may be successfully interposed at law. And there being a complete remedy at law, the defense should be limited to that forum, except in but few cases, and that to prevent great injustice and wrong. This property belonged to the railroad company; it was liable to be taxed, the tax was imposed, and it has never been paid, and equity requires not that the tax should be enjoined, but that it should be paid."

A court of equity will not interfere to declare a tax invalid and restrain its collection, unless the objections to the proceedings are such as go to the very groundwork of the tax, and necessarily affect materially its principle, and show that it must be unjust and unequal. *Kashler v. Dobberpuhl*, 56 Wis. 480. See also *State Railroad Tax Cases*, 92 U. S. 575.

A bill in equity will not lie to restrain a sale of personal property seized for the collection of a tax, in the absence at least of any showing that the property possessed any peculiar value not capable of compensation in damages; the remedy at law is ample. *Henry v. Gregory*, 29 Mich. 68.

But in *Gates v. Barrett*, 79 Ky. 295, it was held that a court of equity has power to restrain the collection of an illegal tax against personal property. The court said: "The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this State that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case however may be placed upon the ground of the inadequacy of the remedy at law. The officer acting in good faith and under the color of right is justified by his process, and is not liable as a trespasser; and as a suit would not lie against the State directly, the only complete remedy is by injunction. But if there was a possible remedy at law against the public officer, it would not be sufficient to deprive the party of relief of equity. High on Injunctions, sections 796 and 801."

A Court of Chancery has jurisdiction to enjoin the collection of a tax, and will exercise it in all cases where the tax has been levied without authority of law, or where the property is not subject to taxation. *Kimball v. Merchants' Savings, etc., Co.*, 89 Ill. 611. As exempt property, *Smith v. Osburn*, 53 Iowa. 474; *Mechanics' Bank v. Kansas*, 78 Mo. 555. See also *Southwestern R. Co. v. Wright*, 68 Ga. 311; *Waters Pierce Oil Co. v. Little Rock*, 39 Ark. 412.

STATE V. RAILROAD COMPANY.

(34 W. Va. 782.)

Constitutional law — inter-State commerce — prohibition — Sunday freight trains.

A statute subjecting to punishment railway companies running their freight trains on Sunday is not unconstitutional, although the freight in question is in course of transportation to other States.

CONVICTION of Sabbath-breaking. The opinion states the point.

C. Boggess, for plaintiff in error.

Watts, attorney-general, for State.

GREEN, J. The principal question in this case is: Are sections 16 and 17 of chapter 149 of the Code of West Virginia in contravention of section 8, article 1, of the Constitution of the United States (see Code W. Va., p. 8 and § 5258 of Rev. Stat. of United States, title 64, p. 1017 of 2d edition passed in pursuance of this provision of the Constitution), in so far as it interferes with the transportation of coal or merchandise by a railroad company from the State of West Virginia into Maryland on a Sabbath day, when it is shown that such transportation is neither a work of necessity nor charity, but is simply a following of its regular business on the Sabbath day as on other days? This question is raised by the fifth and sixth instructions offered by the defendant below set out in bill of exceptions No. 3. The court below decided that this law of West Virginia was not in contravention of the Constitution of the United States or of this act of Congress, when so applied to a railroad company so transporting coal or merchandise on the Sabbath day. This decision was excepted to by the defendant in bill of exceptions No. 3. The counsel for the defendant below has argued elaborately this question, and after considering certain decisions of the Supreme Court of the United States, he draws from them these five conclusions:

“1. Transportation is commerce.

“2. Transportation from one State to another is commerce ‘between the States.’

“3. If transportation is begun in one State to be completed or

State v. Railroad Company.

ended in another, whether by the same instrument or carrier, it is commerce 'between the States.'

"4. Commerce 'between the States' is necessarily national in its character and exclusively under the control of Congress.

"5. Non-action by Congress in regulating it is equivalent to a declaration that it shall remain free and untrammelled."

These propositions except the fifth are all sustained by the decisions of the Supreme Court of the United States, when applied to the transportation of merchandise or coal, which is as far as the counsel for the defendant below has in this case any occasion to contend that they are true. If not sustained fully by the decisions referred to by the counsel for the defendant below, they are abundantly sustained by other decisions of the Supreme Court and ought to be regarded as incontrovertible. But if applied to the transportation of persons, they have been controverted and regarded as not true by jurists of eminent ability and by judges of the Supreme Court of the highest capacity. But we have no occasion to consider, whether these propositions or any of them are true when applied to the transportation of persons, as this is entirely foreign to any thing in the case, the transportation of coal or merchandise on the Sabbath day being alone involved in this case; and the statute law of West Virginia (§ 17 of chap. 149, Code of W. Va., p. 695), expressly excepts from the operation of the law even in considering "the transportation on Sunday of the mail or of passengers and their baggage."

The fifth proposition of the counsel for the defendant below in the broad sense laid down by the counsel is not sustained by the decisions of the Supreme Court of the United States, though individual judges have used language so broad and unqualified that such an inference might be drawn. But the decision really made in the cases, in which such broad and unqualified language was used, do not sustain the proposition that "non-action by Congress in regulating commerce between the States in any particular matter is equivalent to a declaration that it should remain free and untrammelled. And therefore that any regulation of any sort in such a case by State legislature is null and void." There can be no doubt, that though Congress has failed to regulate commerce between the States, certain kinds of legislation by the States regulating such commerce would be null and void. But it is equally clear that certain regulation of such commerce might in the absence of

State v. Railroad Company.

legislation by Congress on the subject be enacted by State legislatures, which unquestionably would not be unconstitutional by contravening article 1, section 8, sub-division 3 of the Constitution of the United States, which gives to Congress the power "to regulate commerce among the several States."

The law is thus laid down by the Supreme Court of the United States in *Gilman v. Philadelphia*, 3 Wall. 713: "The power to regulate commerce between the States covers a wide field and embraces a great variety of subjects, some of which will call for uniform rules and national legislation, while others can be best regulated by rules and provisions suggested by the varying circumstances of different places and limited in their operation to such places respectively. And to the extent required by these last cases, the power to regulate commerce between the States may be exercised by the States, so far as such legislation is not in conflict with some act of Congress passed either before or after such State legislation regulating commerce in this particular case and manner." This was decided by the court and was not the dictum of some judge. It is true it was decided by a divided court. The decision was rendered as late as December, 1865, and merely followed a decision rendered in December, 1851, in which seven judges concurred and but two dissented. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299. These decisions again met the approval of the Supreme Court of the United States in *Crandall v. Nevada*, 6 Wall. 35, decided in December, 1867. The same doctrine was recognized again in *Welton v. State*, 91 U. S. 275, and in *Henderson v. Mayor*, 92 id. 259, and in other cases. The last to which I will refer is the *County of Mobile v. Kimball*, 102 id. 691. This case was decided as late as October, 1880, and was concurred in by all the judges.

The dissenting view of individual judges on which the counsel bases his proposition No. 5 above quoted is referred to; and Judge FIELD, in delivering the opinion of the entire court on page 699, says: "There have been, it is true, expressions by individual judges of this court going to the length that the mere grant of the commercial power, anterior to any action of Congress under it, is exclusive of all State authority; but there has been no adjudication of this court to that effect." He then reviews the various decisions of the court on this subject and reaches the conclusion, page 702, that "whether the power to regulate commerce between the

State v. Railroad Company.

States is vested exclusively in the general government depends upon the nature of the subject to be regulated." And he adds: "This may be considered as expressing the final judgment of this court." This fifth proposition of the counsel is true only in a qualified sense; and the support of it referred to by the counsel in his argument are these ill-advised and condemned views of individual judges.

I have considered the extent to which this fifth proposition or inference of counsel is true, in order that there may be no misconception of our views.

To sustain his propositions one counsel cites the following authorities: *Welton v. Missouri*, 91 U. S. 275; *Lord v. Steamship Co.*, 102 id. 544; *Mobile v. Kimball*, id. 702; *Railroad Co. v. Husen*, 95 id. 465; *Hall v. De Cuir Adm'r*, 95 id. 485; *Henderson v. Mayor*, 92 id. 259; *Case of Daniel Ball*, 10 Wall. 557; *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U. S. 1. From these cases large quotations are made, but an examination of them all will show, that with the exception of some loose language of individual judges or the opinions of individual judges not in consonance with the views of the court, there is nothing decided in any of these cases inconsistent with the views which I have expressed. And they render necessary some qualification of the five propositions of law deduced from them. But if they really sustained these five propositions in their broadest and most comprehensive sense, they would in no manner affect in any degree the conclusion to which I must come on the question we are considering. Admit, as is certainly true, that the transportation of coal or merchandise from West Virginia to Baltimore, or from any point through West Virginia to Baltimore, is commerce between the States, and that the regulation of this commerce belongs exclusively to the Congress of the United States under article 1, section 8, clause 3 of the Constitution of the United States, and that the non-action of Congress in regulating it is equivalent to a declaration that it shall remain free and untrammelled, and thus forbids the legislature of the State to pass any laws regulating it in any matter or to any degree, still all this in no manner tends to show, much less does it as assumed in the argument of counsel prove, sections 16 and 17 of chapter 149 of our Code are void because in contravention of said Constitution of the United States. That clause, so far as it relates to this case, is as follows: "The Congress shall have power to regulate commerce among the several

States." The act of our legislature supposed to be in conflict with this provision of the Constitution of the United States is, so far as it relates to this case, as follows: "If a person on a Sabbath day be found laboring at any trade or calling, or employ his servants in labor or other business except in household or other work of necessity or charity, he shall be fined not less than five dollars for such offense." This act does not conflict with the provision of the Constitution of the United States above quoted, for the simple reason that the State act in no manner undertakes to regulate commerce between the States, even allowing that the Constitution of the United States confers in all possible cases and under all circumstances the exclusive regulation of commerce between the States on the Congress of the United States.

When this case was formerly before this court we held, that "it was obviously not intended by this act of our legislature to enforce the observance of the Sabbath as a religious duty. The legislature obviously regarded it as promotive of the mental, moral and physical well being of men that they should rest from their labors at stated intervals; and in this all experience shows they were right." 15 W. Va. 383. The court said further: "It has been very generally held, that statutes more or less resembling ours were constitutional, because they did not enforce the observance of the Sabbath as a religious duty." We concluded for this reason, that our statute was not a violation of our State Constitution and that it applied equally to individuals and to corporations. It never occurred to us to consider whether our statute violated that provision of the United States Constitution which gives to Congress the exclusive regulation of commerce between the States. And such an idea was not in any way suggested then by the counsel of the Baltimore and Ohio Railroad Company, though the case was argued elaborately and amply by him. This of itself would seem to indicate, that it was a far fetched idea, that our statute was a regulation of commerce between the States. But though it was not seen, when formerly before this court, it is now insisted that it is clearly a statute regulating commerce between the States, if it be applied, as it then was, to the Baltimore and Ohio Railroad Company. This position is taken because counsel assumes, that as one of the consequential effects of this statute, if applied to railroads, would be to diminish the transportation of freight on the Baltimore and Ohio railroad, as no freight would be transported on this railroad on

State v. Railroad Company.

Sunday unless the transportation of it was a work of necessity or charity. Unquestionably this statute will have the effect of diminishing the transportation of freight over the Baltimore and Ohio railroad on the Sabbath day; but it is well settled, "that every thing which affects commerce is not simply for that reason a regulation of it within the meaning of the Constitution of the United States." This has been repeatedly decided by the Supreme Court of the United States. Thus in the case known as the *State Tax on Railway Gross Receipts* or *Reading Railway Company v. Pennsylvania*, 15 Wall. 284, it was held: "A statute imposing a tax upon the gross receipts of railroad companies is not repugnant to the Constitution of the United States, and it is not a regulation of commerce between the States." Justice STRONG, delivering the opinion of the court, says:

"No doubt any tax upon business affects the subjects and operations of commerce, yet it is not every thing which affects commerce that amounts to a regulation of it within the meaning of the Constitution (p. 293). * * * * That its ultimate effect may be to increase the cost of transportation may be admitted. So it must be admitted that a tax on any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument as a railroad car, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid (p. 294). * * * * While it must be conceded that a tax upon inter-State transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they had been mingled with the general property of the carrier (the railroad company), than there is for denying the State power to tax goods which have been imported after their original packages had been broken, and after they have been mixed with the mass of personal property in the country" (p. 295).

Upon these principles the right of the State of West Virginia to tax the gross receipts of the Baltimore and Ohio Railroad Company for transportation in this State is clear, yet the greater part of those receipts is derived from the transportation of through freight products from the Western States to Baltimore and from Baltimore either to this State or through this State to Western States. This

State v. Railroad Company,

taxation of course increases the charges made by the railroad on the goods transported from other States to or through this State. It operates indirectly as a charge on the goods transported from one State to another, yet it is no regulation of commerce. But a tax directly on the goods transported from other States to this State or transported through this State would be a regulation of commerce between the States, and if made by this State, would be a violation of the Constitution of the United States. For the real and prime object of the framers of the United States Constitution, in giving to Congress the exclusive control of commerce between the States, was to prevent the several States from burdening the citizens of other States by laying unreasonable and unjust burdens on their goods coming into the State for sale or merely passing through the State. But the tax on the cars of the railroad or on the gross amount of their receipts produces no such ill effects, and is in fact an exercise of the police power of the State, which it never surrendered, and which it may exercise, though it may incidentally affect the commerce between the States. It is a misnomer to call the exercise of such police power, because it may or does affect inter-State commerce, a regulation of commerce between the States.

So in *Munn v. Illinois*, 94 U. S. 40, it was held, when a warehouse is situated within a State, the State may as a matter of domestic concern prescribe regulations for it, notwithstanding it is used as an instrument by those engaged in inter-State commerce as well as in State commerce. And though in this case the law may in its character be a regulation of commerce, until Congress acts in reference to the inter-State relations of such warehouse, such regulations can be enforced, even though they may indirectly operate on commerce beyond the jurisdiction of the State.

The *Slaughter-house* case, 16 Wall. 36, is another instance where a law obviously affecting inter-State commerce was held valid as a police regulation for the comfort of the people.

In *City of New York v. Miln*, 11 Pet. 102, a law of New York was held not in contravention of this provision of the Constitution of the United States which provides that "every master of every vessel arriving in New York from a part of any other State is required under prescribed penalties within one day after his arrival to report in writing the names, ages and last legal settlement of every passenger." This act was decided not to be a regulation of

State v. Railroad Company.

inter-State commerce, but a police act, which the State had a right to pass as a means to prevent her being burdened with paupers. The court says, page 139: "We plant ourselves on what we consider impregnable positions. They are these: A State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, when the jurisdiction is not surrendered or restrained by the Constitution of the United States. That by virtue of this it is not only the right but the bounden and solemn duty of the State to advance the safety, happiness and prosperity of its people, and to provide for their general welfare, by any and every act of legislation, which it may deem conducive to these ends, when the power over the particular subject or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to mere municipal legislation, or what may perhaps more properly be called internal police powers, are not thus surrendered or restrained; and consequently in relation to these, the authority of a State is complete, unqualified and exclusive. If we were to attempt a definition of this internal police we should say every law came within this description which concerns the welfare of the whole people of the State or of any individual within it; whether it related to their rights or their duties; whether it respected them as men or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of the State or of any individual within it; and whose operation was within the territorial limits of the State and upon persons and things within its jurisdiction." Surely the law of this State, fining one who employs his servants in laboring on Sunday, comes within this definition of "an internal police law," which any State has a right to pass, though it does affect inter-State commerce, the regulation of which belongs exclusively to Congress.

To show what is regarded by the Supreme Court of the United States, as now organized, as this police power of the State, which it has never surrendered, I will refer to the opinion of Justice STRONG in the case of the *Railroad Company v. Husen*, 95 U. S., decided October, 1877. He says: "We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may probably be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to ex-

State v. Railroad Company.

tend to making regulations promotive of domestic order, morals, health and safety. As was said in *Thorp v. Rutland and Burlington Railroad Co.*, 27 Vt. 149, it extends to the protection of lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State. According to the maxim *sic utere tuo ut alienum non lædas*, which being of universal application it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. It was further said that by the general police power of a State, a person's own property was subjected to all kind of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made so far as natural persons are concerned. It may be also admitted that the police power of a State justifies the production of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, pauperism or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases" (pp. 470-71). * * * "Neither the unlimited power of a State to tax, nor any of its large police powers, can be exercised to such extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a State may indeed affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule of conduct."

In that particular case a law of Missouri prohibited the driving or conveying any Texan, Mexican or Indian cattle into the State of Missouri between the first day of March and the first day of November in each year, and it seems to me to have been very properly held to be unconstitutional. Such a law did not come within the police power of the State, as it has been above defined and illustrated. It was not intended to promote the mental, moral and physical well being of the people of Missouri, but it was a discrimination in inter-State commerce to the prejudice of the people of another State, and it was precisely for the prevention of such wrongs that the clause was inserted in the Constitution of the

State v. Railroad Company.

United States conferring upon Congress the exclusive regulation of inter-State commerce. See *Railroad Co. v. Richmond*, 19 Wall. 589, where Justice FIELD says correctly: "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation." This Missouri statute was obviously intended to make just such discrimination as this constitutional provision was intended to prevent. It was clearly unconstitutional.

But how utterly different is the law of this State which we are considering. It was obviously, as we said when the case was formerly before us, passed for the sole purpose of promoting the mental, moral and physical well being of our people by providing that they should rest a seventh part of their time from labor of every description, and that this rest should be at regular intervals. The legislature had no sort of purpose in so doing to regulate in any way inter-State commerce. It does not, as the Missouri statute did, propose to trammel, hinder or shackle commerce. It lays no tax on such merchandise coming into or going out of the State, as some unconstitutional laws have done. It was, it seems to me, obviously a mere police law intended simply to promote the welfare of the people of the State, and it does not operate to discriminate as against any class of persons non-residents of the State or citizens of other States. It was intended for and was only an internal police law, and though it may have some incidental effect upon the inter-State commerce carried on by the Baltimore and Ohio Railroad Company, that fact according to all the authorities does not make such a law unconstitutional as regulating inter-State commerce; for it does not regulate it in the constitutional sense of this word. Many more authorities might be cited, which would strengthen the views above taken, but it is deemed unnecessary, as while the authorities show that there has been sometimes difficulty in determining whether an act of the legislature was a regulation of inter-State commerce or an internal police law, yet these cases show that where such difficulty arose it was because of an inherent difficulty in determining what was the real object of the legislature in the passage of the act; in the case before us it is obvious that the entire object of the act was to promote the mental, moral and physical well being of persons in this State, and though it might incidentally affect the transportation of merchandise on Sunday over the Baltimore and Ohio railroad, yet in no case, which I have

State v. Railroad Company.

seen, would this incidental effect convert what was clearly a law simply of internal police into a law regulating inter-State commerce, No doubt there have been persons, who would so construe this clause of the Constitution giving to Congress the right to regulate inter-State commerce, that with a like strained interpretation of other general provisions in the United States Constitution it would confer on Congress almost unlimited power of legislation and thus change essentially the character of our government, and take by implication from the States to a great extent the power to legislate with reference to their internal affairs ; but I think none have yet gone so far as to deny to the State legislature the power to pass such a law as we are discussing. If the spirit had always prevailed of giving no strained construction to the Constitution of the United States, but only such construction as it fairly bore having reference to the evils intended to be corrected by the Constitution, I cannot but think that great and crying evils, the legitimate result of this mode of construing the Constitution, would have been avoided.

In the present case the evil to be corrected by the giving to Congress the power to regulate inter-State and foreign commerce was, in the language of Justice FIELD in *Railroad Co. v. Richmond*, 19 Wall. 584, "to secure equality and freedom in commercial intercourse against discriminating State legislation." The inference to be drawn from these words of Justice FIELD's is, that no State legislation, which does not discriminate in favor of its own citizens or of others against the citizens of other States, and which leaves inter-State commerce free and equal, ought to be construed as violating the spirit of this provision of the Constitution. If the trade of all the States be permitted to be carried on with equality and freedom, all that was intended by this provision of the Constitution is accomplished, and there is no propriety in forcing a construction on this provision of the Constitution so as to harass and trammel the States in legislation with reference to their internal affairs, though many laws of this character passed by them would necessarily affect inter-State commerce, but not so as to produce the inequality and discrimination intended to be avoided by this provision of the Constitution. For these reasons I am of opinion that the Circuit Court committed no error in refusing to grant instructions 5 and 6 set out in the third bill of exceptions.

[Minor matters omitted.]

State v. Railroad Company.

I am therefore of opinion, that the judgment of the Circuit Court of Mineral of May 22, 1880, must be approved and affirmed; and the defendant in error must recover of the plaintiff in error his costs in this court expended and damages according to law.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

WHITAKER V. WARREN.

(60 N. H. 20.)

Parent and child — in loco parentis — action for loss of service and expenses.

Where an infant dies by the negligence of another, one standing in *loco parentis* may recover from him for medical expenses and for actual loss of service up to the time of the death.

ACTION of damages for injuries to plaintiff's adopted minor child by the bite of a dog. The child died from the bite in ten weeks. The child was given by the parents to the plaintiff when a few months old, and had always lived with the plaintiff and been treated as his own child. Its name had been changed, but it had not been legally adopted.

Sulloway, Topliff & O'Connor, and Foote and Dearborn, for plaintiff.

Stevens, for defendant.

STANLEY, J. [Omitting minor points.] The defendant claims that the plaintiff cannot recover, because neither the relation of parent and child, nor that of master and servant, existed between

Whitaker v. Warren.

the plaintiff and the deceased; but the facts stated are evidence tending to show that the plaintiff stood *in loco parentis* to the child, and while this relation existed, the plaintiff was entitled to all the rights of a parent. *Freto v. Brown*, 4 Mass. 675; *Mulhern v. McDavitt*, 16 Gray, 404; *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; Cooley Torts, 235. This being the case, the plaintiff is entitled to recover for nursing and care of the child after the injury and while it lived, and for medicines and medical attendance. For the personal injury to the child he cannot recover (*Hall v. Hollander*, 4 B. & O. 660; *Dennis v. Clark*, 2 Cush. 347, 351; 48 Am. Dec. 301; Bouv. Inst., § 2289), nor for loss of services, without evidence to that effect. *Woodward v. Washburn*, 3 Denio, 369, 371; *Stephenson v. Hall*, 14 Barb. 222; *Hall v. Hollander*, *supra*; *Dennis v. Clark*, *supra*; *Franklin v. South Eastern Railway*, 3 H. & N. 211; Cooley Torts, 226; Wood Mast. and Serv. 441, 442, 443.

The right of the parent to recover for loss of services caused by injuries inflicted by third persons is founded upon the fact that he is entitled to the earnings of the child during its infancy (*Jenness v. Emerson*, 15 N. H. 486; Schou. Dom. Rel. 344, 631); and it stands on the same ground as the right of a master to the labor and services of his apprentices. Schou. Dom. Rel., *supra*; 2 Kent Com. 192 *et seq.* The plaintiff standing to the child *in loco parentis*, we cannot say that he is not entitled to recover for the loss of his services. His right to recover is not absolute — it depends upon whether there has in truth been a loss of services; whether the child was capable of rendering services; and whether the plaintiff has been deprived of the services by the defendant's wrongful act. If the jury should so find, the plaintiff is entitled to damages from the time of the injury until the child's death — such damages as will be a full compensation for the loss sustained during that period. Ruth. Inst., B. 1, chap. 22, § 1; Greenl. Evid., § 253; Field Dam. 21; *Wyatt v. Williams*, 43 N. H. 107. Whether he can recover for loss of service after the death and during its infancy is a question on which we express no opinion.

Case discharged.

ALLEN, J. did not sit: the others concurred.

KELEHER V. PUTNAM.

(60 N. H. 80.)

Insanity — arrest without process.

An insane person may be arrested and detained without legal process, only when it is reasonably necessary.

ASSAULT and false imprisonment. The defendant was a county commissioner. The plaintiff was mildly insane, and the defendant without process arrested and detained her. The defendant had judgment below.

C. A. O'Connor, for plaintiff.

Sulloway, Topliff & O'Connor, for defendants.

BINGHAM, J. A county commissioner has no authority over insane persons by virtue of his office. The right of personal liberty is subject to some exceptions necessary to the common welfare of society. At common law a private citizen, without warrant, may lawfully seize and detain another in certain cases. It is justifiable to hold a man to restrain him from mischief. It is lawful to interfere in an affray which endangers the lives of the combatants. Other instances are enumerated in *Colby v. Jackson*, 12 N. H. 526. Under the right of self-defense it is lawful to seize and restrain any person incapable of controlling his own actions, whose being at large endangers the safety of others. But this is justifiable only when the urgency of the case demands immediate intervention. The right to exercise this summary remedy has its foundation in a reasonable necessity, and ceases with the necessity. A dangerous maniac may be restrained temporarily until he can be safely released, or can be arrested upon legal process, or committed to the asylum under legal authority. But not every insane person is dangerous. Nothing can be more harmless than some of the milder forms of insanity. Nor is it any justification that the defendants were actuated by a desire to promote the plaintiff's welfare. The right of personal liberty is deemed too sacred to be left to the determination of an irresponsible individual, however conscientious. The law gives these unfortunate persons the safe-

Darling v. Wilson.

guards of legal proceedings and the care of responsible guardians. *Davis v. Merrill*, 47 N. H. 208; 22 Monthly Law Rep. 385; 6 South. Law Rev. (N. S.) 568; 3 Am. Law Rev. 193; Ray Insan., §§ 614-619. The legislature has established appropriate forms of proceeding for ascertaining their mental condition, imposing upon them, under the supervision of public functionaries, the restraint necessary to protect them from the imposition of others, and subjecting them to such treatment as may restore their reason. If the plaintiff requested to be taken to Lawrence, she revoked the license by resisting the removal. The instructions given to the jury were erroneous. The question was, whether the plaintiff's removal was reasonably necessary under the circumstances of the case. Cooley Torts, 176-179; Addison Torts, chap. 12, § 2.

Verdict set aside.

STANLEY, J., did not sit; the others concurred.

DARLING V. WILSON.

(60 N. H. 59.)

Mortgage — of animals — increase.

As against innocent third parties, a mortgage of a mare gives a lien upon a colt with which she is with foal only so long as is necessary for its suitable nurture.

TROVER. The opinion states the point.

Wellington, for plaintiff.

Albee, for defendant.

STANLEY, J. The effect of the mortgage, when executed, was to give the mortgagee a lien upon the mare, and upon the colt with which she was with foal. *Cudworth v. Scott*, 41 N. H. 456; *Forman v. Proctor*, 9 B. Monr. 124; *Evans v. Merriken*, 8 Gill & J. 39; *McCarty v. Blevins*, 5 Yerg. 195; 26 Am. Dec. 262; *Fonville v. Casey*, 1 Murph. (N. C.) 389; 4 Am. Dec. 559. This principle is not disputed, but how long this lien continues, no mention of the increase being made in the mortgage, is not

entirely clear. There being nothing in the mortgage showing an intention to create a lien upon the increase of stock mortgaged, the lien existing only as an incident to the mortgage would, as between the parties, continue so long only as is necessary for the suitable nurture of the increase. This view is supported upon sound principles. But however this might be as between the parties, as between the mortgagee and an attaching creditor not having notice, and not put on inquiry, there could be no doubt. The mortgage making no mention of the increase, conveys no notice to third persons of any lien. Indeed, it would tend to restrain inquiries. The possession of the mortgagor is evidence of title, and a purchaser or attaching creditor, finding the mortgagor in possession, and finding nothing upon the records indicating any lien, and having no knowledge of a lien, has the right to infer that the property is unincumbered. The record is a substitute for a change of possession. The purpose of the record is to give notice that the person in possession is not the absolute owner, and to do this there must be such description as will put the purchaser or attaching creditor upon inquiry, and enable him to discover the true state of the title. If it falls short of this, the object of the statute of registration is not accomplished. How can it be said that a description, which in no way alludes to the subject-matter of the inquiry, is constructive notice that another thing, which at some remote period may have had a connection with some article of property described in the mortgage, is included in it? What is there, in the fact that the mortgage in this case, made in February, 1877, was upon "one bay mare seventeen years old," to suggest to a stranger, who examined the records in May, 1879, that a colt two years old, which the mortgagor had in his possession, he having sold the mare, was the offspring of the mare mortgaged? The mortgage, being constructive notice merely, cannot be notice of a lien upon property which is not described in such way as to suggest an inquiry in regard to it.

If the plaintiff's view is correct, there is no limit to the amount of property that can be held upon a mortgage of live stock. If the mortgage covers the increase of the particular animals mortgaged, so that they cannot be sold to an innocent purchaser or attached by an innocent creditor, it would, for the same reason, cover the increase of the increase to an indefinite period, and no person would be safe in purchasing live animals of one who had at any

Bank of Newbury v. Sinclair.

time made a mortgage upon his live stock, without examining into the pedigree of the animal and ascertaining whether some of its ancestors were among those mortgaged, however great the inconvenience or expense in so doing. This is not the law. *Winter v. Landphere*, 42 Iowa, 471.

Upon the facts founded by the referee, the colt was open to attachment, and the defendant is entitled to

Judgment on the report.

BINGHAM, J., did not sit; the others concurred.

BANK OF NEWBURY V. SINCLAIR.

(60 N. H. 100.)

Guaranty — continuing notice of acceptance and default.

Under a written guaranty to be responsible for indebtedness incurred before a certain day, notice of acceptance and of default is unnecessary.*

ACTION on a guaranty. The head-note and opinion show the case.

Bingham, Mitchell & Batchellor, for defendant.

Leslie & Rogers and Ladd, for plaintiff.

FOSTER, J. The defendants contend that they are not liable on the contract of guaranty which they signed, because there has been no notice to them of an acceptance of the guaranty on the part of the bank, or of the amount of money advanced on the faith of it; and they argue that the guarantors have the right to know what the acceptor of the guaranty expects of them, in order that they may take security or indemnity from the party in whose favor they have assumed liability; that they are entitled to notice within a reasonable time and that a reasonable time would be such time as would secure to them all means of protecting themselves. But at the date of their contract they assumed a liability which was to continue. This was a voluntary undertaking on their part, and

* See *King v. Batterson* (18 R. I. 117), 43 Am. Rep. 18.

the opportunity for indemnity was afforded at the time when they assumed their responsibility; and a failure to avail themselves of that opportunity was not attributable to any want of notice by the bank, but only to their own laches and their improvident confidence.

When notice of the acceptance of a guaranty is required, it is for the purpose of informing the guarantor that the person to whom his offer or proposal to guarantee is addressed intends to look to him ultimately for payment of the liability, and what the extent of that liability is. But this doctrine is inapplicable to cases where the agreement to accept is contemporaneous with the guaranty or constitutes the consideration or basis of it. In such a case all the parts of the transaction are connected, and notice of acceptance is implied. *Fell Guar.* 319; 2 *Pars. Cont.* 13; *Story Prom. Notes* (7th ed.), § 460, note 2; *Wildes v. Savage*, 1 *Sto.* 22; *Walker v. Forbes*, 25 *Ala.* 139, 147; 60 *Am. Dec.* 498; *Jackson v. Yandes*, 7 *Blackf.* 526; *Maynard v. Morse*, 36 *Vt.* 617; *Howe v. Nickles*, 22 *Me.* 175; *Smith v. Dann*, 6 *Hill*, 543; *Bleeker v. Hyde*, 3 *McLean*, 279; *New Haven Co. Bank v. Mitchell*, 15 *Conn.* 206; *Douglass v. Howland*, 24 *Wend.* 35; *Union Bank v. Coster*, 3 *N. Y.* 212; 53 *Am. Dec.* 280; *Powers v. Bumcratz*, 12 *Ohio St.* 273.

And it is equally clear, that in order to charge the defendants no demand of payment or notice of Sinclair's default was required. The contract and undertaking of the defendants was not merely a promise to pay an indefinite sum within an indefinite time, upon the default of the principal debtor. It was a joint and several absolute promise to guarantee the payment of a sum limited in amount, upon no other condition than that the debt, the payment of which was thus guaranteed, should be contracted before March 1, 1878. The insolvency of Sinclair before the expiration of that period could not affect the liability of the guarantors. That was a contingency, which in the exercise of reasonable prudence, they were bound to contemplate and provide for at the time of entering into their contract with the plaintiffs. The liability of the defendants attached unconditionally and became fixed as soon as the indebtedness of Sinclair subsequently occurred. No condition as regards presentment or notice is expressed or implied in the terms of the contract. It is an undertaking and promise to do a certain thing in a certain specific event. The event is a default in the payment of the principal party's debt on or before a certain date.

Bank of Newbury v. Sinclair.

When this event happened, the liability of the guarantors, by the terms of their guaranty, was complete.

“ If presentment and notice or any other acts are necessary to establish a default on the part of the person whose contract is guaranteed, they are also necessary to establish the liability of the guarantor, because he is liable only upon the default of the former; for example, if the contract guaranteed is that of an indorser, or (as in *Philips v. Astling*, 2 Taunt. 206) that of a drawer of a bill, presentment to the acceptor or maker, and notice to the indorser or drawer, are necessary, because without such presentment and notice there would be no default on the part of the indorser or drawer, and therefore no liability on the part of the guarantor. But if no presentment or notice is necessary to establish a default on the part of the person whose contract is guaranteed, as in the case of the maker of a note [the case at bar] or the acceptor of a bill, none is necessary to establish the liability of the guarantor.” Story Prom. Notes (7th ed.), 622–627, note 2; Leake Cont. 338. “ In some cases of contracts to do a certain thing in a certain specific event, the law implies a condition that notice shall be given of the happening of the event, and no liability arises under the contract until such notice is given. These are cases where the event upon which the party has promised to perform is within the peculiar knowledge of the other party, and the party that is to perform cannot make himself acquainted with it. But such a condition is not implied in cases where the event upon which the act to be done is the act or default of a third person, for the party who is to perform can make himself acquainted with the happening of the event.” Therefore it is said, and has been repeatedly held in England and in America, that in the case of a guaranty there is no implied condition that notice shall be given of the default of the party whose contract is guaranteed. *Vyse v. Wakefield*, 6 Mees. & W. 442, 452; *Dawson v. Wrench*, 3 Exch. 359, 362; *Makin v. Watkinson*, L. R., 6 Ex. 25; *Lent v. Padelford*, 10 Mass. 230; *Vinal v. Richardson*, 13 Allen, 521, 532; *Train v. Jones*, 11 Vt. 441; *Peck v. Barney*, 13 id. 93; *Sylvester v. Downer*, 18 id. 35; *Noyes v. Nichols*, 28 id. 178; *Montgomery v. Kellogg*, 43 Miss. 486; Fell Guar. 318.

Independently of the particular terms of his contract, a guarantor has certain rights in his character of surety. These rights appertain to all sureties, whether they join in the same contract

Bank of Newbury v. Sinclair.

with the principal, or bind themselves by a collateral agreement. An example of one of the surety's rights is, that there shall be no dealing with the principal by which the surety's right of recourse to him shall be affected. But the surety has not the right to require the taking of any active steps against the principal, or notice to himself of the principal's default. The reason of this has been stated in these words: "The surety is a guarantor, and it is his business to see whether the principal pays, and not that of the creditor." Lord ELDON, in *Wright v. Simpson*, 6 Ves., Jr., 714, 734; *Bellows v. Lovell*, 5 Pick. 307, 311; *Hunt v. Bridgham*, 2 id. 581; 13 Am. Dec. 458. Thus it is said, in the note to Story on Promissory Notes, *ante*: "This seems, at least, as applicable to a person who enters into a contract of guaranty. So far as the question of presentment or notice is concerned, the person who undertakes to pay upon the default of another seems to be under as absolute an obligation to pay when the default occurs, as the person who enters into an original agreement to pay jointly with, and as surety for, another. The terms of a guaranty seem to impose on the guarantor the duty of seeing whether the principal pays; if the principal does not pay, and the guarantor sustains loss through ignorance of his default, the loss is owing to his own negligence, and it seems much more appropriate that it should be borne by him than by the person to whom he has agreed to be answerable upon the principal's default." Many English authorities are cited in support of this doctrine, which is certainly sustained by the following (among other) American cases: *Gage v. Mechanics' Bank*, 79 Ill. 62; *Dickerson v. Derrickson*, 39 id. 574; *Gage v. Lewis*, 68 id. 604, 618; *Hammond v. Gilmore*, 14 Conn. 479; *Bushnell v. Church*, 15 id. 406; *Donley v. Camp*, 22 Ala. 659; 58 Am. Dec. 274; *Townsend v. Cowles*, 31 id. 428; *Woolley v. Sergeant*, 8 N. J. L. 262; *Noyes v. Nichols*, 28 Vt. 159; *Keith v. Dwinell*, 38 id. 286, 293; *Clay v. Edgerton*, 19 Ohio St. 549; *Watson v. Walker*, 23 N. H. 471; *Waters v. Thanet*, 2 A. & E. (N. S.) 765, 770; *Kautzman v. Weirick*, 26 Ohio St. 330.

Earlier Massachusetts cases, which seem to hold the contrary doctrine, are disapproved in *Vinal v. Richardson*, 13 Allen, 521, 533, in which it is said: "The circumstances show pretty conclusively that the defendant knew of the default of the principal debtor. If he did not know of it, it was from his own neglect to inform himself. He has not suffered from want of notice."

Sleeper v. Laconia.

In this State the tendency of the cases is to establish the rule, that where the guaranty is in the nature of an offer to be responsible for a contingent, future liability (*e.g.*, a guaranty of payment for goods that may afterward be sold), it is necessary to give reasonable notice of the extent to which it has been acted on; but that no notice is necessary in the case of an absolute guaranty of a specific engagement. *Beebe v. Dudley*, 26 N. H. 249; *March v. Putney*, 56 id. 34.

In view of this vast preponderance of authority, we have no hesitation in holding that in all the apparent circumstances of the present case, no notice of the acceptance of the guaranty, nor of demand of payment, nor of default to pay on the part of the debtor, was required. Such we understand to be the law of Vermont, where this writing was executed, and where the contract was to be performed.

[Minor matters omitted.]

It therefore follows, that after the application of the \$6,750, as before indicated on Sinclair's \$12,000 note, and on the Pierce and Quimby notes, the plaintiff will be entitled to judgment in all three of these actions.

Cases discharged.

STANLEY, BINGHAM and CLARK, JJ., did not sit; the others concurred.

SLEEPER V. LACONIA.

(60 N. H. 201.)

Deed — boundary on river.

A boundary by a line running "to the river and thence on the river shore," conveys to the center of the stream. (*See note, p. 812.*)

CONTROVERSY about land taken for a highway. The opinion states the point.

Hibbard and Whipple, for plaintiff.

Jewell & Stone, for defendants.

Bank of Newbury v. Sinclair.

with the principal, or bind themselves by a collateral agreement. An example of one of the surety's rights is, that there shall be no dealing with the principal by which the surety's right of recourse to him shall be affected. But the surety has not the right to require the taking of any active steps against the principal, or notice to himself of the principal's default. The reason of this has been stated in these words: "The surety is a guarantor, and it is his business to see whether the principal pays, and not that of the creditor." Lord ELDON, in *Wright v. Simpson*, 6 Ves., Jr., 714, 734; *Bellows v. Lovell*, 5 Pick. 307, 311; *Hunt v. Bridgham*, 2 id. 581; 13 Am. Dec. 458. Thus it is said, in the note to Story on Promissory Notes, *ante*: "This seems, at least, as applicable to a person who enters into a contract of guaranty. So far as the question of presentment or notice is concerned, the person who undertakes to pay upon the default of another seems to be under as absolute an obligation to pay when the default occurs, as the person who enters into an original agreement to pay jointly with, and as surety for, another. The terms of a guaranty seem to impose on the guarantor the duty of seeing whether the principal pays; if the principal does not pay, and the guarantor sustains loss through ignorance of his default, the loss is owing to his own negligence, and it seems much more appropriate that it should be borne by him than by the person to whom he has agreed to be answerable upon the principal's default." Many English authorities are cited in support of this doctrine, which is certainly sustained by the following (among other) American cases: *Gage v. Mechanics' Bank*, 79 Ill. 62; *Dickerson v. Derrickson*, 39 id. 574; *Gage v. Lewis*, 68 id. 604, 618; *Hammond v. Gilmore*, 14 Conn. 479; *Bushnell v. Church*, 15 id. 406; *Donley v. Camp*, 22 Ala. 659; 58 Am. Dec. 274; *Townsend v. Cowles*, 31 id. 428; *Woolley v. Sergeant*, 8 N. J. L. 262; *Noyes v. Nichols*, 28 Vt. 159; *Keith v. Dwinell*, 38 id. 286, 293; *Clay v. Edgerton*, 19 Ohio St. 549; *Watson v. Walker*, 23 N. H. 471; *Waters v. Thanet*, 2 A. & E. (N. S.) 765, 770; *Kautzman v. Weirick*, 26 Ohio St. 330.

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It therefore follows, that after the application of the \$6,750, as before indicated on Sinclair's \$12,000 note, and on the Pierce and Quimby notes, the plaintiff will be entitled to judgment in all three of these actions.

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Hibbard and Whipple, for plaintiff.

Jewell & Stone, for defendants.

STANLEY, J. Baldwin once owned the premises in question. His line extended to the river, "thence on the river," etc. This gave him the soil to the thread of the stream. *State v. Gilmanton*, 9 N. H. 461; *Greenleaf v. Kilton*, 11 id. 530; *State v. Boscowen*, 28 id. 217; *Nichols v. Suncook Mfg. Co.*, 34 id. 345, 349; *Kimball v. Schoff*, 40 id. 190; *Bradford v. Cressey*, 45 Me. 9. Running the line to the river does not restrict the grant to bank or shore of the river. The river is the monument, and like a tree, a stake, a stone, or any other monument, controls the distance, and is to be considered as located equally on the land granted and the land of the adjoining owner. The center of the monument is the boundary, and the grant extends to that point.

These views are not controverted, but the defendants contend that the clause in the deed from Baldwin to Reeves and from Reeves to the plaintiff, "thence north-easterly on the river shore," limits and restricts the grant to the bank or shore of the river. In *Woodmann v. Spencer*, 54 N. H. 507, this question was considered in respect to land bounded by a highway, and it was there held that the expressions, on the highway, and by the side of the highway, were identical in meaning and effect; and this view is fully sustained by *Dovaston v. Paine*, 2 Sm. L. C., H. & W., notes 213, 216, 232, 234, 235, 237, 238; *Motley v. Sargent*, 119 Mass. 231; *Peck v. Denniston*, 121 id. 17; *O'Connell v. Bryant*, id. 557. The rule is a presumed understanding of the parties that the grantor does not retain a narrow strip of land under a stream or other highway, because the title of it left in him would generally be of little use, except for a purpose of annoyance and litigation.

The evidence as to the agreement between Baldwin and Reeves tended to contradict the deed, and was properly excluded. *Goodeno v. Hutchinson*, 54 N. H. 159.

Judgment on the report for the plaintiff for \$400.

FOSTER J., did not sit; the others concurred.

NOTE BY THE REPORTER.—See 43 Am. Rep. 118; 82 id. 719; 16 id. 524; 28 id. 233; 31 Eng. Rep. 689.

One of the boundaries of the land conveyed was first described in the deed as "to a monument upon the bank of the stream, thence westerly by the stream to the road." The deed closed with reference to a plan in which the same boundary in its whole length falls short of the stream. *Held*, that this was not a case for the application of the rule that the first clause in a grant pre-

Farnum v. Patch.

vails, and that the plaintiff's title was restricted to the line indicated by the plan. *Erakine v. Moulton*, 66 Me. 276.

The starting point in the description in a deed was described as where Pine creek crossed a certain section line: the third call carried the line "east to Pine creek; thence north-easterly, up the west bank of Pine creek, to the place of beginning:" *Held*, that the land conveyed extended only to the west bank of the creek, and not to the middle of the stream. *Murphy v. Copsland*, 51 Iowa, 515.

FARNUM V. PATCH.

(60 N. H. 294.)

Partnership — "shares" in a business.

Unincorporated persons taking certain numbers of "shares," "for the purpose of starting a grocery store," are partners between themselves, although they called themselves "stockholders" and their opinion was that there was no liability for losses beyond the amount paid for the shares.

BILL for contribution. The opinion states the facts.

Rand and Ladd, for defendant.

Burns and Sawyer, for plaintiff.

DOE, C. J. By the written agreement, the signers "agree to take the number of shares set against our names, at \$25 per share for the purpose of starting a grocery store — said stockholders to decide upon the location for said store, and make all other arrangements necessary to carry into operation said store." There being no purpose to organize a corporation, this was an agreement to become unincorporated "stockholders" of "a grocery store." The defendants, Dodge and Manahan, did not sign the agreement, and did not become stockholders. Manahan gave the stockholders \$50, which was given back to him; but he was neither a partner nor a creditor. He neither took nor agreed to take any "shares" in the store; he did not hold himself out, nor consent to be held out, as a stockholder; and he has in no way made himself liable for the debts or losses incurred in the business of the store. The defend-

ants, Colburn and G. A. Duncklee, signed the agreement, but did not become stockholders by taking, that is, paying for the shares they agreed to take; and the facts of an estoppel are not found against them. It does not appear that they induced the plaintiff to believe and act upon the belief that they were stockholders. The case does not raise the question of their liability for damages for their non-performance of their agreement to become stockholders, or the question of their liability to become stockholders on a bill for specific performance of their agreement. This bill for dividing losses among stockholders cannot be maintained against those who have never been stockholders.

The other defendants and the plaintiff became stockholders by performing their agreement "to take the number of shares set against our names, at \$25 per share, for the purpose of starting a grocery store." Whether specific performance of this agreement to become stockholders could have been enforced on a bill in chancery, and whether damages for its non-performance could have been recovered in a suit at law, are now immaterial questions. Those who became stockholders by voluntarily and specifically performing their agreement to take shares, accepted, as between themselves, the rights conferred and the obligations imposed by the writing, which is the best evidence of their intention and understanding. If the writing did not correctly state the contract they intended to make with each other, it could have been reformed on a bill in equity, or abandoned by common consent. Having been neither changed by legal process, nor rescinded by the parties, it is binding upon them like any other written contract, and cannot be varied by parol.

Those who took the shares they agreed to take considered themselves "stockholders;" they so described themselves in the agreement; and "stockholders," in the agreement, means "partners." They became stockholders, without being incorporated and without any design of forming a corporation, "for the purpose of starting a grocery store," and they carried their purpose into execution. In pursuance of the agreement, they delivered to the plaintiff sums of money equal to the shares set against their names, at \$25 per share, to be invested in goods to be bought for the store. The money thus raised was the property of the firm; and the goods bought with the money were the property of the firm. There was no loan or gift of the money, the goods, or the proceeds of the

Farnum v. Patch.

goods. The purpose of starting a grocery store was accomplished in April, 1875. In less than two years all the shares except those of Savage were sold by their owners, and were bought by Savage. And the question is, whether each stockholder is liable to contribute, in proportion to his number of shares, for the payment of debts of the store contracted and losses of the store incurred while he was a stockholder.

The "shares" which by the written agreement the "stockholders" were to take, were shares of the stock of which by the agreement they were to be holders; and that stock was the capital stock of the store which it was their purpose to start. There was no other stock of which they became holders in pursuance of the agreement. They were to own shares of undivided property; there was to be a community of interest; and the property which they were to own in common was to be "a grocery store." The store which it was their purpose to start was not a mere building, but a grocery business, including its capital stock, profits, and losses. There would be a balance of profit or a balance of loss; profits and losses, producing that balance, were certain. Losses (by expense and leakage, if not otherwise) were as inevitable as profits; and the maintenance of an exact and continuous equilibrium of losses and profits was impracticable. In April, 1876, the books showed \$459.71 as a balance of profit. Each cent of profit, when received from a customer, was not to be set aside and kept as a separate fund with a preserved identity. If that course had been taken, the fund of profits, being a part of the price received for goods sold, would have been the fund of the stockholders of the store. The profits were to be mingled with and become a part of the stockholders' capital. The capital stock, owned in common, would be money, goods, fixtures and implements of the business, and claims for goods sold on credit, if sales on credit were made.

The business in which the capital was to be employed was buying and selling the goods of a grocery store. The stockholders engaged in that mercantile business were to be joint principals carrying on the business. This is the natural and obvious meaning of the written contract of unincorporated "stockholders," taking "shares" "for the purpose of starting a grocery store;" there is no competent evidence giving the contract a different meaning; and such principals are partners. *Eastman v. Clark*, 53 N. H. 276, 294; s. c., 16 Am. Rep. 192. The community of interest in the

profits and losses of the business, like the community of interest in the original capital, was an unavowed incident, and an unsevered and unalienated part of the community of interest in the grocery business started by the stockholders, and carried on by nobody else as principal during the time they held their shares of the capital. During that time they were not creditors of the principals by whom the business was carried on. That it was carried on during that time by their debtors as principals is a fact that has not been and manifestly cannot be found. There were no such debtors; and without debtors there can be no creditors.

The written contract did not provide that anybody but subscribing stockholders should have any interest in the business; and nobody but such stockholders acquired any interest in it, during the time for which contribution is sought. There was no gift or contract by which, during that time, any part of the business, chattels, money, debts, credits, profits or losses of the store belonged to any one but the stockholders. They carried the original contract into execution without any departure from its legal meaning. They owned their shares from the moment they created stock by taking shares, until they sold them. Until they sold them, the business started by them did not cease to be theirs. No share was sold to any one who was not an original member of the firm. By sales of shares, the number of the partners was diminished; but the business was the business of partners until stockholder Savage became the owner of all the shares. Then, and not till then, and by his purchase of all the shares of his copartners, the partnership was finally dissolved. When a shareholder sold his shares he withdrew from the firm, and did not become liable to contribute for debts afterward contracted, or losses afterward incurred; but he was not discharged from his liability to bear, by contribution, his share of debts contracted and losses incurred while he was a partner. The "further liability" from which he was relieved was that which would subsequently arise in the continuance of the business of the store, and not that which had already arisen. For debts contracted by the firm after his retirement he might be liable to creditors (*Zollar v. Janvrin*, 47 N. H. 324), but not to his copartners. Long after the amicable and harmonious dissolution of the firm, the present controversy arose, from the fact that the stockholders did not wind up the business and pay the debts out of the capital stock, and when they severally sold their shares, did not severally

Farnum v. Patch.

require indemnity from the purchaser against the vendor's liability for existing debts. And for his own omission each stockholder is alone responsible.

The liability of the subscribing stockholders depends, not upon their opinion of the legal meaning of "partnership," but upon their knowledge and understanding of the facts of their shareholding enterprise, proved by competent evidence. Their shares were not given away. No one understood that he was a donor or a donee of any of the shares taken by the subscribers. If they had loaned their capital, they would have been creditors of the borrowers for the amount loaned. If they had loaned it to members of the grange, and the latter had been the principals in the grocery business, the shareholders, being members of the grange, would have been both lenders and borrowers, and as borrowers and principals would have been partners, whose names should have been filed with the town-clerk (G. L., chap. 117, §§ 1 and 2); and this bill, amended if necessary, could have been maintained. But it is not found that more than one person understood himself to be a borrower of any part of the capital. Simpson alone understood the capital was loaned to the grange; and his unilateral understanding could amount to no more than his loan of his own shares to himself. The shareholders knew they were unincorporated stockholders from the time they took their shares until they sold them. Their belief or understanding, that during that time they were not "partners" in the legal sense of the word, was a mistaken and immaterial view of the law. They entertained the erroneous opinion, that for some unexplained reason their liability was limited in extent to the amount of the shares they took at \$25 per share. Their liability to that amount they understood. How they were incurring liability to that amount if not as principals in the business of the store, and how they were principals and not partners in that business, are unanswered questions.

A limitation of their liability to the amount of money paid as their shares of the original capital would have been an important safeguard which they could have obtained as special partners, under the statute of limited partnerships (G. L., chap. 118), if they could have found some one willing to relieve them of the unlimited liability of general partners by taking it all upon himself as a general partner, associated with special partners. Without taking any steps to obtain such a limitation, they assumed its legal existence. They were

necessarily to be the owners of the profits as profits, while they held their shares. But the losses might exceed the profits; the balance of loss might be more than \$25 per share; and in supposing it was not necessary for them either to get some one to bear the excess of loss beyond a certain limit, or bear it themselves, they fell into a not uncommon error of law. They contemplated losses, for they understood they were liable to lose their shares of the original capital. Their intention not to bear any excess of loss beyond that limit was not carried out by a bilateral agreement that while such balance of profit as might accrue should be theirs, such balance of loss as might accrue, beyond the amount of \$25 per share, should fall upon somebody else. Their understanding of such an actually existing limit of their known and acknowledged liability was, in effect, an understanding of a grocer, that although goods are bought for his store and become his by purchase, neither he nor any one else is to be a debtor for them, if he has previously lost, or if he afterward loses, the original capital of his grocery by fire or robbery, or by the expenses and bad debts of his business.

If their liability had been affected by their understanding that it was limited to the amounts paid in by them as their shares of the original capital, this bill could be maintained. Upon that understanding they would be liable to those amounts. Their sale of their shares would not have discharged the limited amount of their liability for debts and losses incurred while they were members of the firm. But the supposed limitation of their liability was mere legal error.

The business of the store was begun and continued under the general management of "a committee" of three stockholders, appointed by the grange of which the stockholders were members, and recognized by them as a committee. All knew that the business was thus begun and continued, and no one made any objection. Every thing appears to have been done by unanimous consent, because upon the supposed legal limitation of their liability as a basis of their venture, there was no cause of dissent or dissatisfaction. No one understood that the committee were the only principals, or were carrying on the whole or any part of the business at their separate risk, or were entitled to more of the profits, or subject to more of the losses, than were appurtenant to the number of shares they had taken as original subscribers. As unincorporated stockholders who start a grocery by furnishing shares of its capital

Farnum v. Patch.

stock are partnership grocers, language being used in its ordinary legal sense, so the title of "a committee" for managing the business of the grocery signifies the agency of the managers. The committee were agents, and were understood to be agents by all parties in interest; and they were not made sole principals by a lack of skill in book-keeping that was harmless, or by acting as agents in conducting the business in a manner known and approved by every member of the firm. They hired money with which goods were bought for the store; and the plaintiff, being one of the committee, has repaid the hired money out of his own funds. The result is as if his money had been paid for those goods. All the partners knew that goods were bought for the store on credit, or with hired money; and their silent acquiescence, with knowledge, was a ratification and authorization of that method of doing their business and increasing their grocery capital.

Shares were sold by stockholders at different times. When the plaintiff and Woodward, being two members of the committee, sold their shares to Savage, the other member, November 7, 1876, the right of the other stockholders to continue the partnership with a less numerous firm was not impaired. Not only was no attempt made to infringe it or deny it, but it was fully recognized and maintained. If the action of the plaintiff and Woodward had affected the rights of their copartners, and had not been authorized, the latter would not have been bound by it. If it had affected their rights and had been authorized by them, they could not complain of it. They did not complain, and there was no cause of complaint. The transaction was, in legal effect, a proper sale to Savage of such shares as the plaintiff and Woodward could sell at a certain price, and a proper agreement of Savage that he would buy the other shares at the same price if the owners would take it. All the other stockholders were left in the full enjoyment of their previous position. They could continue to be shareholders with unimpaired rights, or cease to be shareholders by selling their shares to whom they pleased, or by winding up the business. They accepted Savage's offer, and sold their shares to him, and thus dissolved the firm without controversy, and without any cause of controversy.

The sale of their shares by stockholders was much more than an approval of the action of the committee. It was a distinct claim that what they sold was theirs until they sold it. They did

Farnum v. Patch.

not defraud the purchaser by selling him something that belonged to others, or something that did not exist. They sold their shares, not of loaned money or loaned capital stock, but of the grocery store, which had been started by taking shares, and of which Savage became sole owner by taking the shares he agreed to take, and buying all the others. They sold the number of shares they had originally taken, and had held until they chose to hold them no longer. They sold, not their shares of a part of the store, but their shares of the whole of it. The whole included all the goods, money, credits, and apparatus that constituted the capital stock of the store, profits not excluded. And that capital stock included goods, or profits and proceeds of goods, bought for the store with money which the plaintiff and the other members of the committee hired on notes, which the plaintiff, being liable to pay, has paid. The hiring of the money is immaterial. The case is as if the money had come from the plaintiff's pocket at first, as it did at last. The practical and legal result of the transaction is, that by their sale of their shares the other stockholders appropriated to their own use their shares of goods, or the profits and proceeds of goods, bought for the store and paid for by the plaintiff. Such a ratification of his action leaves no equitable or technical ground on which all the losses can be thrown upon him by stockholders who have thus taken their shares of the capital and profits.

The part of the capital raised by taking shares, and by Manahan's gift, was less than \$1,400. The average amount of goods in the store was from \$5,000 to \$7,500. The larger part of the capital was goods, and proceeds of goods, bought with money hired by the committee. Savage finally became sole owner of all the shares. And when the other stockholders sold their shares of the whole capital stock, they knew that a part of the stock was goods, or the profits and proceeds of goods, bought on credit or with hired money. They knew that only a part of the stock, of which they were selling their shares, had been bought with their original capital or its proceeds. The larger part of what they sold had been paid for by the plaintiff. By their sale of their shares of the whole capital of the store, with knowledge that a part of it had been obtained on credit (with hired money or otherwise) as an increase of their original capital, they confirmed the act of enlargement on credit, and took their shares of the increase; and by their confirmation of the act and appropriation of the property they

Tilton v. American Bible Society.

bound themselves to pay their shares of the cost of the increase. They accepted, and converted to their own use, property or the profits and proceeds of property, which was bought for their store, and for which they have not paid; and by their sale of their stock they unequivocally asserted that before that sale they were stockholders of the store, invested with all the rights and subject to all the liabilities of unincorporated shareholders of a grocery. Their community of interest in profits and losses was demonstrated by their sales of their shares of a capital stock that had not been loaned or given away, but had been used in a business in which profits and losses must occur.

Bill dismissed as to Dodge, Manahan, Colburn, and G. A. Duncklee. Decree for the plaintiff against the other defendants.

FOSTER, J., did not sit; the others concurred.

TILTON V. AMERICAN BIBLE SOCIETY.

(60 N. H. 377.)

Evidence — parol — to explain ambiguity.

A legacy being provided for "the Bible Society," parol evidence is competent to show what society was meant, and evidence that an annual contribution was taken for one of them in the testator's church is competent.*

BILL to construe will. The head-note shows the point.

Bingham, Mitchell & Batchellor, for plaintiff.

C. R. Morrison, for society.

DOR, C. J. There is no patent ambiguity. If there had been but one Bible society, the bequest to "the Bible Society" would not have been void for uncertainty. The will would not have made it doubtful what Bible society the testator meant. Extraneous evidence disproving the existence of more than one such society would have had the same effect as similar evidence in relation to an individual described in the will, by name or otherwise, as a legatee. The existence of more than one Bible society presents a latent am-

* See 46 Am. Rep. 76, note.

Tilton v. American Bible Society.

biguity. The question is not whether a plea of misnomer of a party is sustained by proof, nor whether there is a variance between the evidence and the name of a third person set forth in pleading. The question is not by what name any Bible society was known to others, but which one of several Bible societies was intended by the testator. The testamentary name, or other testamentary description of a legatee (whether an individual or a society, incorporated or unincorporated), is evidence of the testator's intention. Evidence showing what name was given to a Bible society in its charter, what name it used or recognized as its own, and by what name or names it was known to others, tends to prove a name by which the legatee might have been known to the testator, and a name which he might have used in his will to express his intention. But the society intended by him, and identified by competent evidence, is the legatee, by whatever name described in the will, and notwithstanding any other name or names by which it may have been invariably or usually known to others. The New Hampshire Bible Society, being pointed out by such terms in the will as he would be likely to use in describing that society, being the one he would probably mean when he spoke of "the Bible Society," and being found, upon competent evidence, to be the society intended by him, the law does not withhold the legacy from the donee intended by him, and does not give it to those who he meant should not have it. A person known to a testator as A. B. and to all others as C. D. may take a legacy given to A. B.

Samuel may take a legacy given to Edward, the testator having been in the habit of calling him Edward. *Parsons v. Parsons*, 1 Ves. Jr. 266. A bequest was made to "Robert Careless, my nephew." The testator had two nephews of that name. With one of them he was intimately acquainted; the other was very little known to him, and it was uncertain whether he knew that the Christian name of the latter was Robert. The presumption was in favor of the former. *Careless v. Careless*, 19 Ves. 601, 505. If a man has two sons, both baptized by the name of John, and conceiving that the elder (who has been long absent) is dead, devises land to his son John, and in truth the elder is living, the ambiguity may be resolved in favor of the younger, by evidence that the testator thought the elder was dead. *Lord Cheyney's case*, 5 Rep. 68. In *American Tract Society v. De Witt*, 9 Allen, 447, 451, the American Tract Society was a legatee. There were two socie-

Tilton v. American Bible Society.

ties of that name, one incorporated in New York, and the other in Massachusetts. There was evidence tending to prove that the Massachusetts society was incorporated many years before the other, had held public anniversary meetings, maintained a place of business in Boston, and constantly solicited and received contributions in the churches and from individuals throughout the larger part of Massachusetts, and in other New England States. The testator was a citizen of Massachusetts, residing there at the time of his death, and there was evidence tending to prove he was aware of the existence of that society and had contributed to its funds. The court inferred he intended his bequest for the domestic corporation, and not for the foreign one, of whose existence there was no certain evidence that he had any knowledge. If it had been certain that he had no knowledge of any other tract society than the one chartered in Massachusetts, his intention would have been as clear as in a bequest to his son John when he had two living sons of that name, one of whom he believed to be dead.

In this case, if of several Bible societies only one had been known to the testator, his knowledge or want of knowledge on that subject would have been as conclusive evidence of his intention as the existence of no more than one. And as a bequest to A. B. may be presumed to have been intended for a person of that name with whom the testator lived on intimate terms, rather than for a person of the same name who was but little known to him, so it may be inferred that this testator meant the Bible society for which contributions were regularly solicited in, and with the license and approval of the religious associations of which he was a member, rather than any other Bible society not thus commended to him as a preferred object of the charity of his church, not specially brought to his consideration, and not shown to have been within his knowledge. In like manner a latent ambiguity as to other legatees may be explained. If there were but one Foreign Mission society, one Home Mission society, and one Tract society, they would have been the ones intended by the testator. If there were more than one of either kind, the one intended by him might be identified by extraneous evidence. *Bartlett v. Remington*, 59 N. H. 364.

[Minor points omitted.]

Case discharged.

STANLEY, J., did not sit; the others concurred.

Baldwin v. Hartford Insurance Company.

BALDWIN V. HARTFORD INSURANCE COMPANY.

(60 N. H. 422.)

Insurance — fire — severability.

Under a fire insurance policy conditioned against alienation without notice, such alienation of one of several parcels avoids the policy, unless it can be said as matter of law that the remaining risk is not increased.*

ACTION on an insurance policy. The opinion shows the facts.

W. & H. Haywood, for plaintiff.

S. C. Eastman, for defendants.

CLARK, J. [Omitting minor matters.] This presents the question, whether the alienation by the insured of one of several parcels of real estate separately valued in the same policy, containing a provision against alienation, avoids the policy as to the parcels not alienated. Upon this point the authorities are not agreed. *May Ins.*, §§ 277, 278; *Clark v. Ins. Co.*, 6 Cush. 342; 53 Am. Dec. 44; *Kimball v. Ins. Co.*, 8 Gray, 33; *Lee v. Ins. Co.*, 3 id. 583, 594; *Friesmouth v. Ins. Co.*, 10 Cush. 587; *Gould v. Ins. Co.*, 47 Me. 403; *Barnes v. Ins. Co.*, 51 id. 110; *Ins. Co. v. Spankneble*, 52 Ill. 53; *Quarrier v. Ins. Co.*, 10 W. Va. 507; s. c., 27 Am. Rep. 582; *Merrill v. Ins. Co.*, 73 N. Y. 452; s. c., 29 Am. Rep. 184.

Without considering the question whether the contract of insurance in this case is to be regarded as entire and indivisible because a gross sum is insured for a single and entire consideration (*Plath v. Ins. Co.*, 23 Minn. 479), or as severable and divisible because the amount of insurance is apportioned upon separate and distinct items of property covered by the policy (*Merrill v. Ins. Co.*, *supra*), let us apply the ordinary rules for the interpretation of contracts to this policy. In the construction of contracts the intention of the parties must govern, the subject-matter of the agreement is to be considered, and that interpretation adopted which will give effect to such intention. The object of the stipulation in a policy of insurance against a sale of the property insured is apparent. It is obviously based upon the idea that the risk and

* See *McGowan v. People's Mut. Fire Ins. Co.* (54 Vt. 211), 41 Am. Rep. 843.

Baldwin v. Hartford Insurance Company.

hazard of loss may be increased by a change of ownership. All men are not equally prudent and cautious in the care of their property. The insurers may be willing to insure the property of A. at a certain rate, when they would not insure the same property for B. at any rate, nor insure it for A. if B. was owner of other property so situated as to affect the hazard of A.'s property. The stipulation being a reasonable one which the insurers have a right to make, and its object being to protect the property insured from increased risk, should be so construed as to give effect to the intention of the parties. If the court can say as matter of law that the alienation of one piece of property does not increase the risk of other property covered by the same policy, then the reason of the condition ceasing, the condition itself may be disregarded. But unless the court can say as matter of law that the risk is not increased, a reasonable interpretation of the contract requires that the stipulation shall be so construed as to give effect to the intention of the parties, and afford that protection against increased hazard which it was designed to secure. Another general and elementary rule in the construction of contracts is, that words are to be understood in their ordinary and popular sense, except in those cases in which the words used have acquired by usage a peculiar sense different from the ordinary and popular one. In this case no words are used which have acquired by usage a different signification from the ordinary and popular one; and if the language is to be understood in its ordinary and popular sense, the conclusion is irresistible that the sale, transfer, or conveyance of the property insured renders the policy void, not merely as to the property alienated, but void as to the whole property insured. Another rule of interpretation is, that the terms of a contract are to be understood so as to have an actual and legal operation, and the construction is to be such that the whole instrument or contract and every part of it may take effect, if it be possible consistently with the rules of law and the intention of the parties. The application of this rule of construction leads to the same result. If the stipulation in the policy relating to the alienation of the property insured is to be limited and made applicable only to the property alienated, it is meaningless and superfluous. The contract of insurance is a contract of indemnity to the person and not to the thing insured. It does not run with the subject-matter of insurance, and pass as an incident by any assignment or conveyance

Towle v. Wood.

of it; and therefore a sale, transfer or conveyance of any part of the property insured renders the policy void as to the property sold or conveyed without any stipulation in the policy prohibiting alienation. To give any legal effect to the conditions in the policy before us relating to the sale, transfer or conveyance of the property, it must be construed and understood to mean what the language imports, that a sale, transfer, or conveyance of the property renders the policy void.

Judgment for the defendant.

STANLEY, J., did not sit; BLODGETT, J., dissented.

TOWLE V. WOOD.

(60 N. H. 424.)

Will — agreement as to bank deposit.

An agreement between two savings-bank depositors, that the survivor shall have the other's deposit, not being executed according to the statute of wills and each retaining control during his life, is invalid.

ASSUMPSIT. The head-note and opinion show the case.

Frink, for plaintiff.

A. R. Hatch, for defendant.

STANLEY, J. The plaintiff concedes that he cannot recover on the ground of a gift *inter vivos* or *causa mortis*, but he claims that the act of the parties was a placing of money on deposit, in their joint names, with the intent that the sum remaining should go to the survivor; and he cites *Marshal v. Crutwell*, L. R., 20 Eq. 328, 13 Moak Eng. Rep. 830; and *Batstone v. Salter*, L. R., 10 Ch. App. 431; 14 Moak Eng. Rep. 714, in support of this view. Those cases are different in principle from this. In *Marshal v. Crutwell* the money was deposited in the bank upon the understanding that it was to be drawn by both parties, and the balance remaining at the death of either was to go to the survivor. Here the referee finds that neither intended to give up the right of control of their respective deposits during their respective lives.

Towle v. Wood.

Each party retained absolute control over his deposit during life, but each expressed the desire that the survivor should have the balance remaining at the decease of the other. It was a testamentary disposition of the balance remaining at the decease, but it lacked the requisite formalities of execution to make it effectual. *Bartlett v. Remington*, 59 N. H. 364, 366.

Another claim of the plaintiff is, that he can recover on the ground of a promise for a promise. The promise, if any, was in substance, "I bequeath to you the balance of my deposit which I do not expend during my life, if you survive me, in consideration of your bequeathing to me the balance of your deposit which you do not expend during your life, if I survive you." There was nothing in this agreement which prevented either party from withdrawing his deposit, and making any other disposition of the money that suited his convenience or pleasure. No liability would have been incurred if it had been done. The mutuality essential to make a promise a sufficient consideration for a promise is wanting, for neither promise was absolute. Each of the parties reserved the right to disable himself to perform his promise. Either party could withdraw all his deposits, and leave the other without any consideration for his promise. It is said that a voidable promise is a good consideration for a promise; but this is not the general rule. It is true in respect to the contracts or promises of infants made with persons of full age. 1 Pars. Cont. 451, 452. This case falls within the principle of *Cutting v. Gilman*, 41 N. H. 147, 153; *Reed v. Spaulding*, 42 id. 119; *Craig v. Kittredge*, 46 id. 57, and *Bartlett v. Remington*, 59 id. 364.

Another position taken by the plaintiff is, that the agreement and acts of the parties created a trust on the part of each in favor of the other; but the difficulty with this view is, that neither ever parted with the control of his deposit, and never intended to do so. On the contrary, each retained absolute control, and the unconditional right to make any different disposition of the funds which he chose. These facts are inconsistent with the position that a trust was created. To create a trust, each of the parties must have been deprived of the power of revocation and control. *Bartlett v. Remington*, *supra*; *Gerrish v. New Bedford Savings Inst.*, 128 Mass. 159; s. c., 35 Am. Rep. 365; *Urann v. Coates*, 109 Mass. 581; *Ray v. Simmons*, 11 R. I. 266; s. c., 23 Am. Rep. 447; *Stone v. Bishop*, 4 Cliff. 593.

Fellows v. Allen.

Nor was the act of the parties a reducing to possession of the property of the wife by the husband. The husband exercised no control over the fund in the life-time of the wife, and never intended to do it. It was not only necessary that he should reduce it to his possession, but that there should be coupled with this an intention to make it his own. *Hall v. Young*, 37 N. H. 134; *Hoyt v. White*, 46 id. 45; *George v. Cutting*, id. 130, and authorities *passim*. F. B., never having parted with the possession and control of her deposit, could dispose of it by her will.

Judgment for defendant.

CLARK, J., did not sit; the others concurred.

FELLOWS V. ALLEN.

(60 N. H. 439.)

Marriage — wife's ante-nuptial will.

A woman's ante-nuptial will is not revoked by her marriage. (*See note, p. 329.*)

A PPEAL from probate of will. The opinion states the point.

Wiggin & Fuller, for plaintiff.

Marston & Eastman, for defendant.

ALLEN, J. [Omitting other points.] At common law a married woman had no power to dispose of real estate by will, nor of personal estate, except by the consent of her husband given at the time, and continued till the probate of the will. 2 Jarm. Wills, 129; 1 Redf. Wills, 21, 22, 23; *Tucker v. Inman*, 4 M. & G. 1049, 1076; *Marston v. Norton*, 5 N. H. 205; *Cutter v. Butler*, 25 id. 343, 350. Her incapacity to make a valid will prevented her from altering a will made before marriage, either by codicil or the substitution of a new will in its place, and also from recognizing it as her valid will. That feature of a will which makes it ambulatory in character until the death of the testator was destroyed, and a woman's ante-nuptial will was revoked by her marriage. *Force & Hemb-ling's case*, 4 Coke, 60. 61; *Hodsdon v. Lloyd*, 2 Br. Ch. C. 534;

Fellows v. Allen.

Morton v. Onion, 45 Vt. 145. The incapacity of a married woman to make a will arose at common law from her husband's marital rights in the control of her property. When those rights did not exist, or were excluded, the incapacity ceased, and the wife could make a valid will. *Cutler v. Butler*, *supra*; *Miller v. Phillips*, 9 R. I. 143; *Carey's Estate*, 49 Vt. 246. By Rev. Stat., ch. 149, § 3, it was provided that a married woman, when entitled to hold property in her own right and to her separate use, might dispose of it by will as if she were sole and unmarried. By the statute of 1845 a married woman was enabled to dispose of her real estate by will, subject to any rights acquired by the husband by the marriage contract; and in 1846 it was enacted by statute that married women should have the same rights as they would if unmarried as to all property secured to their separate use by a written antenuptial contract, and all property conveyed or devised to them for their separate use after marriage. Married women thereby became entitled to dispose of property so held by will. By the laws of 1860, ch. 2342, the testamentary capacity of married women was extended so as to embrace all her estate, subject only to the husband's right of curtesy and distribution. The statutes on the subject have remained substantially without change to the present time. The incapacity of a married woman to make a will having been removed by these statutes, and she having become fully empowered to dispose of her own property in that way, no reason remains why her will made before marriage should, by mere force of the marriage contract, be revoked. If revoked, the testatrix could make another like it after marriage. The law does not operate to destroy and restore the same thing by the same breath. The testamentary incapacity of the married woman destroyed her premarital testament. The law having removed the incapacity which operated as the destroying power, the will made before marriage remains unrevoked by that change in the testator's life.

Decree affirmed.

NOTE BY THE REPORTER.— See 22 Am. Rep. 164. To the same effect is *Webb v. Jones*, 26 N. J. Eq. 168. The chancellor said: "But it is insisted that the marriage revoked the will, and that therefore the law casts the title to the property which did not come to the hands of the trustees upon him. I am of opinion that the marriage did not revoke the will. The reason why at the common law the marriage of a woman was a revocation of her will, was that she could not, as a married woman, make a will, and therefore wills being in their nature

Fellows v. Allen.

ambulatory until the testator's death, the law deprived her will made before marriage of all validity. And though a wife might, in the absence of an enabling provision in the marriage settlement, make a valid will of her separate estate, without her husband's consent, and therefore in such case the reason for the rule ceased, yet the rule was held to be applicable under such circumstances also. Where however a woman after the execution of a marriage settlement giving her a power to dispose of her property by will, made a will before marriage in execution of the power, it was held not to have been revoked by the marriage. *Logan v. Bell*, 1 C. B. 872. But by our law a wife loses no power to make a will by her marriage, except so far as the interest which the law gives her husband in her real property is concerned. That her will cannot affect. But as to her personal property, and her real property too, (subject to her husband's rights therein) she has as full power to make a will as she had when she was unmarried. In other words, her right to make a will continues as before, notwithstanding her marriage. The reason therefore (her disability) for holding marriage to be a revocation no longer exists, and therefore the rule itself should no longer exist. In this case the will has been admitted to probate, and therefore the executor has a right to all the testatrix's personal property, for the letters testamentary are general. In *Ryno v. Ryno*, 27 N. J. Eq. 522, where a married woman's will had been admitted to probate, and letters of administration were afterward issued to her husband, it was held that the fund must be paid over to the executor to be administered according to law, because of the fact that the will had been admitted to probate. In *Douglas v. Cooper*, 8 M. & K. 878, where a woman, having a power of testamentary appointment by her marriage settlement, made a will after marriage, and her husband dying, she married again, it was urged that her marriage after executing the will was a revocation of the will. The will had been admitted to probate in the ecclesiastical court. Sir JOHN LEACH, M. R., though of opinion that by the subsequent marriage the will was revoked, yet held it valid (it having been duly executed), because it had been admitted to probate. Having been admitted to probate, the will cannot be declared void here on the ground that the marriage revoked it; and it may be added, it appears to have been executed with the formalities required by the marriage settlement. It must be accepted as the true will of Mrs. Jones, and her property must be administered under it.

In *Brown v. Clark*, 77 N. Y. 369, it was held that the statute declaring the will of an unmarried woman to be revoked by her subsequent marriage is not abrogated by the subsequent statutes enabling married women to make wills, and thus taking away the reason of the common-law rule. The court said: "We concur in the conclusion reached by the surrogate that the will was revoked by the subsequent marriage of the testatrix. It was the rule of the common law that the marriage of a woman operated as an absolute revocation of her prior will. *Force and Hembley's case*, 4 Co. 61. The reason of the rule is stated by Lord Chancellor THURLOW in *Hodden v. Lloyd*, 2 Bro. Ch. 584. He says: 'It is contrary to the nature of the instrument which must be ambulatory during the life of the testatrix; and as by the marriage she disables herself from making any other will, this instrument ceases to be of that sort.

State v. Dame.

and must be void.' The rule that the marriage of a *feme sole* revoked her will was made a part of the statute law of this State by the Revised Statutes. 3 R. S. 64, § 44. The language of the statute, that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, is the declaration of an absolute rule. The statute does not make the marriage a presumptive revocation which may be rebutted by proof of a contrary intention, but makes it operate *eo instanti* as a revocation. 4 Kent Com. 528. It is claimed by the contestants that the testamentary capacity conferred upon married women by the recent statutes in this State takes away the reason of the rule of the common law, and that upon the maxim *cessante ratione legis, cessat lex ipsa*, the rule should be deemed to be abrogated. Upon the same ground it might have been urged at common law that the marriage of a *feme sole* should only be deemed a revocation or suspension of her prior will during the marriage, and that when the woman's testamentary capacity was restored by the death of her husband, leaving her surviving, the will should be revived; but the contrary was well settled. *Force and Hembley's case*; 1 Jarm. 106; 4 Kent Com. 508. But the courts cannot dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. The married women acts confer testamentary capacity upon married women, but they do not undertake to interfere with or abrogate the statute prescribing the effect of marriage as a revocation. It was quite consistent that the legislature should have intended to leave the statute of 1830 in force, although the new statutes took away the reason upon which it was based. The legislature may have deemed it proper to continue it for the reason that the new relation created by the marriage would be likely to induce a change of testamentary intention, and that a disposition by a married woman of her property by will should depend upon a new testamentary act after the marriage."

STATE V. DAME.

(60 N. H. 479.)

Criminal law — disorderly house — requisites of indictment.

In an indictment for keeping a disorderly house it is unnecessary to allege the character of the persons frequenting it.

CONVICTION of keeping a disorderly house. The opinion states the case.

Copeland & Edgerly, for defendant.

The attorney-general and solicitor, for State.

STANLEY, J. The validity of the defendant's exception depends on whether there was a variance between the allegations in the

State v. Dame.

indictment and the proof. The indictment was for keeping a disorderly house ; and it contained an averment that “in the said house certain evil disposed persons, as well men as women, of evil name, fame and conversation, to come together, did cause and procure, and the said persons in the said house, at unlawful times, as well in the night as in the day, on the days and times aforesaid, there to be and remain, drinking, tippling, cursing, swearing, quarrelling, and otherwise misbehaving themselves unlawfully, did permit and suffer.” If this averment was unnecessary, the request was properly refused. It is necessary to prove matter of description only when the averment, of which the descriptive matter forms a part, is material. Bish. Cr. Proc., §§ 484, 487 ; *State v. Copp*, 15 N. H. 212 ; *State v. Bailey*, 31 id. 521 ; *Rex v. May*, 1 Doug. 193 ; *Rex v. Pippett*, 1 T. R. 235.

Rejecting the averment recited, the indictment charges, with proper allegations of time and place, the keeping of a disorderly house, to the great injury and common nuisance of all the peaceable citizens of the State there residing, inhabiting and passing, contrary to the statute, etc. The offense is keeping a disorderly house. The allegation rejected is of facts which go to show that the general charge is well founded, or in other words, a statement of the evidence upon which the charge is based. Hawkins says that “an indictment charging a man with a nuisance in respect of a fact which is lawful in itself, as the erecting of an inn, etc., and only becomes unlawful from the particular circumstances, is insufficient, unless it set forth some circumstances which make it unlawful in its own nature, as keeping a bawdy house.” 2 Hawk. P. C. (ed. 1824) 311. It is no more necessary to allege the facts which go to show it to be a disorderly house, than it is to allege who are disturbed thereby, and this it is said is unnecessary. *King v. People*, 83 N. Y. 587. In the case of a common scold it is not necessary to prove the expressions used. It is sufficient to prove generally that she is always scolding. *J'Anson v. Stuart*, 1 T. R. 748, 754 ; *Rex v. Gill*, Russ. & R. 431 ; *Clark v. Periam*, 2 Atk. 339 ; 1 Russ. Cr. 436 ; *Rex v. Rogier*, 1 B. & C. 272 ; *Rex v. Dixon*, 10 Mod. 326 ; *Rex v. Mason*, 1 Leach (4th ed.), 487, 491, 493 ; 2 Hawk. P. C., ch. 25, § 59 ; Dav. Prec. Ind. 140, 198 ; *State v. Bailey*, 21 N. H. 343 ; *State v. Pierce*, 43 id. 376 ; *State v. Dowers*, 45 id. 543, 545. The indictment is sufficient if it set out so much of fact as to make the criminal nature of what is charged against

 SNOW v. PERKINS.

the defendant appear. If the thing against which the indictment is aimed is not a nuisance in itself, but becomes so only by reason of particular circumstances, this special matter must be shown (2 Bish. C. L., § 813); but the rule is otherwise if the thing is in itself a nuisance. The averment referred to might have been rejected as surplusage. It was therefore not necessary to prove it.

Judgment on the verdict.

CLARK, J., did not sit ; the others concurred.

 SNOW v. PERKINS.

(60 N. H. 498.)

Real property — manure, when not.

Manure not made in the course of husbandry, but made in the business of raising hogs, not fed upon the products of the land, and the manure being mixed with loam drawn from other lands, is no part of the realty.*

TROVER for manure. The head-note shows the facts.

Carter & Nason, for plaintiffs.

T. J. Smith, for defendant.

CLARK, J. Manure made in the ordinary course of husbandry, in the absence of any special contract or custom, is regarded as a part of the realty, and passes by a conveyance of the land without reservation. *Sawyer v. Twiss*, 26 N. H. 345 ; *Conner v. Coffin*, 22 id. 538. But this rule does not apply to manure made in livery-stables, or in buildings unconnected with agricultural property, and out of the course of husbandry. *Plumer v. Plumer*, 30 N. H. 558 ; *Needham v. Allison*, 24 id. 355. In such cases the manure is not considered an incident to the land, and does not pass by a conveyance of it. In the present case, the manure was not made in the ordinary course of husbandry. The business of the plaintiffs was entirely disconnected from the land. The hogs were not fed upon the products of the farm. The loam, which constituted the principal ingredient of the manure, was purchased by the

* See *Chase v. Wingate* (68 Me. 204), 28 Am. Rep. 36.

Goodale v. Mooney.

plaintiffs, and drawn from land outside the limits of the farm, and Snow, one of the plaintiffs, had no interest in the farm or its management, and has never conveyed his title to the manure.

Case discharged.

BLODGETT, J., did not sit : the others concurred.

GOODALE V. MOONEY.

(60 N. H. 528.)

Will — trust for charity.

A trust to executors to distribute a residuum among the testator's relatives and for benevolent objects, in such sums as they shall deem best, is valid.*

BILL to construe will. The head-note shows the point.

Pike & Parsons, for plaintiff.

W. T. & H. F. Norris, for defendants.

SMITH, J. 1. The intention of the testator, by the residuary clause in his will, was to create a trust in the plaintiffs. His language is, "I place the remainder of my property in the hands of my executors to be distributed," etc. His intention, distinctly announced, is, that the remainder of his estate intrusted to them shall be distributed for certain declared purposes. *Erickson v. Willard*, 1 N. H. 217; 1 Perk. Tr., §§ 112-123; 1 Jarm. Wills, 385-408.

2. Is the trust sufficiently definite to be carried into effect? The rule for determining whether the words of a will create a trust or not is, first, the words must be imperative; second, the subject must be certain; and thirdly, the object must be as certain as the subject. *Wright v. Atkyns*, 1 T. & R. 157; *Wood v. Cox*, 2 Myl. & Cr. 684; *Pope v. Pope*, 10 Sim. 1; *Knight v. Knight*, 3 Beav. 148; 1 Perk. Tr., § 114, n. In this case these conditions are complied with. The words are imperative. The testator places his property in the hands of his executors with directions to distribute the

* See *Sowers v. Cyrenius* (39 Ohio St. 29), 48 Am. Rep. 418; *Quinn v. Shields*, ante. p. 141.

Goodale v. Mooney.

same. The subject is the remainder of his estate, and is certain. The object, so far as his relatives are made the distributees, is certain.

3. But the principal question is, whether the devise in trust "for benevolent objects" creates a trust for charitable uses. Is the word "benevolent," as used in the residuary clause of the will, synonymous with "charitable"? These words are classed as synonymous, but do not always express the same meaning. Many charitable institutions may properly be called benevolent, but every object of benevolence is not an object of charity. *James v. Allen*, 3 Mer. 17. It has been held that the word "benevolent" of itself, without any thing in the context to qualify or restrict its ordinary meaning, cannot be deemed charitable in the technical and legal sense (*Chamberlain v. Sterns*, 111 Mass. 267); but it is not necessary to inquire what the law on that point is in this State.

The statute 43 Eliz., chap. 4 (A. D. 1601), contains an enumeration of charitable objects, all of which have since been considered charitable; also many other uses not named within the strict letter of the statute, but which come within its spirit. 2 Perk. Trusts, § 692. It is said that no bequests are deemed within the authority of chancery, and capable of being established and regulated by a Court of Chancery, except bequests for those purposes which the statute enumerates as charitable, or which by analogy come within its spirit and intendment. 2 Story Eq. Jur., § 1155. Whether this statute has ever been adopted in this State has not been judicially determined, and for the purposes of this case it is not important to inquire, for courts of equity have original and inherent jurisdiction over charities, independent of the statute. 2 Perk. Tr., § 694. and authorities cited. "A trust, to be valid, must be under the control of a court, and the trust must be of such a nature that its administration can be reviewed. A trust for charity must therefore be governed by some principles that are familiar to the court. These principles have grown up in relation to the words 'charity' and a 'charitable use,' and to descriptions that come within them; but there are no rules that can be applied to mere benevolence, liberality, or generosity, or to any words that give a discretion and power to the trustees to apply the funds to any purposes within the whole range of human action." 2 Perk. Tr., § 711. Whether a more liberal rule prevails in this State we need now inquire. .

In the case of a charitable gift above all others, it is often said the construction should be such as will preserve rather than destroy the gift. *Saltonstall v. Sanders*, 11 Allen, 446, 455; *Whicker v. Hume*, 7 H. L. Cas. 154. In many of the cases the word "benevolent" has been coupled with "charitable" or some equivalent word, or has been mentioned in connection with such public institutions as to show an intent to make it synonymous with charitable. *Saltonstall v. Sanders*, 11 Allen, 446; *Roch v. Emerson*, 105 Mass. 431; *Hill v. Burns*, 2 Wils. & Sh. 80; *Crichton v. Grier-son*, 3 Bligh. N. R. 424; s. c., 3 Wils. & Sh. 329; *Ewen v. Bannerman*, 2 Dow. & C. 74; s. c., 4 Wils. & Sh. 346; *Miller v. Rowan*, 5 Cl. & F. 99; s. c., 2 Shaw & McL. 866; 2 Per. Tr., § 711 *et seq.*; 1 Jarm. Wills, 211-215. In other cases, where a bequest for "benevolent" purposes contained no qualifying or explanatory words, the bequest has been held void for uncertainty. *James v. Allen*, 3 Mer. 17; *Morice v. Bishop of Durham*, 9 Ves. 399; s. c., 10 id. 522; *Attorney-General v. Haberdashers' Co.*, 1 Myl. & K. 420; *Nash v. Morley*, 5 Beav. 177; *Chamberlain v. Stearns*, 111 Mass. 267. The decisions go upon the ground that the testator intended the word "benevolent" to be understood according to the technical construction which had been put upon it by the courts. But in many of the recent English cases a more reasonable construction in regard to technical language has been adopted. In *Jenkins v. Hughes*, 8 H. L. Cas. 571, the court said words of a technical kind are not necessarily to receive a technical meaning. In *Young v. Robertson*, 4 Macq. H. L. Cas. 314, 325, it was said the primary duty of a court, in the interpretation of wills, is to give each word employed, if it can with propriety receive it, the natural and ordinary meaning which it has in the vocabulary of ordinary life, and not to give words employed in that vocabulary an artificial, secondary or technical meaning. In *Hall v. Warren*, 9 H. L. Cas. 420, it is laid down that in construing the autograph will of an illiterate man the meaning of technical language may be disregarded; but no word which has a clear and definite operation can be struck out. Judge REDFIELD, in commenting upon these cases, says they "evinced a determination not to allow technical rules of construction to overbear and break down all the better instincts and involuntary sentiments of common sense, and the common experience of mankind, even in the construction of wills, and we hail the omen with no slight gratification." 1 Redf. Wills (ed. 1864).

Goodale v. Mooney.

429, n.; *Perkins v. Mathes*, 49 N. H. 107, 110; *Trustees v. Peaslee*, 15 id. 319; *Tilton v. Tilton*, 32 id. 263; *Goodhue v. Clark*, 37 id. 525; *Mathes v. Smart*, 51 id. 438, 440; 1 Redf. Wills, 426, 442; *Stokes v. Salomons*, 9 Hare, 75; *Hart v. Tulk*, 2 De G., M. & G. 311.

We are very much inclined to doubt whether the construing of a will according to technical rules does not result quite as often in defeating as in promoting the testator's intent. In this State the intention of the parties to a written instrument is determined, not by any technical rules of construction, but like a question of fact, by the weight of competent evidence. No technical rules of construction applicable to all cases can be established. The intention in each case is determined by the evidence bearing on the case. *Cole v. Lake Co.*, 54 N. H. 242; *Rice v. Society*, 56 id. 191, 197; *Houghton v. Patten*, 58 id. 326; *Morse v. Morse*, id. 391; *Brown v. Bartlett*, id. 511; *Wilkins v. Ordway*, 59 id. 378.

In this case, there is nothing in the thirty-fourth clause of the will which indicates that the testator did not intend by the word "benevolent," objects which are technically known as "charitable." The clause reads: "I place the remainder of my property in the hands of my executors, to be distributed by them after my decease among my relatives, and for benevolent objects, in such sums as in their judgment shall be for the best. In case the first named executor, John H. Goodale, shall find himself in need of means, he can take from the residue above named the sum of \$3,000." It may be said that it is quite probable the testator did not know there is any legal difference between the words "charitable" and "benevolent." Most persons probably use the words indifferently, and as meaning the same thing. If it had occurred to the testator to look in the dictionary, he would have found the words classed as synonymous. See Web. Dict., "charitable," "charity." In its popular sense, by a benevolent person is understood one who emphasizes his good wishes by well-doing.

Looking to the testator's circumstances and the rest of the will for light, it appears that he died leaving no lineal heirs or widow; that he devised to various charitable and religious institutions, and to many of his heirs at law, and to heirs of his deceased wife, legacies in money to the amount of \$38,200; also that he made specific legacies of personal property, and specifically devised his real estate. The amount to be distributed under the clause in question is about \$25,000. In disposing of this estate, amounting

Goodale v. Mooney.

probably to \$75,000, the disposition made of his estate in other parts of his will furnishes some evidence of what was his intent in the residuary clause. He bequeathed to the Tilton and Northfield Congregational Society \$1,000; to the New Hampshire Home Missionary Society, \$2,000; to the New Hampshire Bible Society, \$500; to the Foreign Missionary Society, \$500; to the New Hampshire Ministers' Widows' Society, \$1,000; to the New Hampshire Conference Seminary at Tilton, \$500—total, \$5,500; all of which must be regarded as charitable objects. The balance of the sum of \$38,200 is bequeathed mostly to relatives by blood or marriage. Some small sums, in the aggregate not large, are given to persons not denominated in the will as relatives—as, for example, \$300 to Mrs. Ruth Cox, of Holderness, a woman then upward of one hundred years of age, the apparent object of the bequest being for her relief and comfort in her extreme old age, and hence within the line of charitable gifts. His intent as thus disclosed appears to have been to distribute his property to his relatives and for charitable objects; and we think it is a fair construction of the residuary clause to hold that the trustees might distribute the remainder of his estate to such relatives within the statute of distributions (*Varell v. Wendell*, 20 N. H. 431) as are needy, and to such charitable objects as he gave specific legacies to. The use of the word "relatives" excludes all others as individuals. In authorizing his executors to dispose of the remainder to the distributees in such sums as in their judgment shall be best, he evidently had in view the necessities of his relatives, as well as the comparative claims for benevolent support of charitable institutions. The coupling of the provision in the same clause, that his son-in-law might take \$3,000 of the residue in case of need, gives additional strength to this construction. The use of the conjunction "and" in the clause "among my relatives and for benevolent objects," shows that the testator did not intend to give this large sum wholly to his relatives, nor wholly to charitable institutions, but to both objects in such sums as the executors should judge best.

On the question whether a bequest for a benevolent purpose, not charitable in the technical sense, would be void, we express no opinion.

4. The question, whether parol evidence is admissible for any purpose in giving construction to the will, will be considered when such evidence is produced.

Case discharged.

STANLEY, J., did not sit; the others concurred.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

WEBER V. HARTMAN.

(7 Colo. 13.)

Estrays — right of finder to use.

Estrays may not be used by the finder unless it is necessary for their preservation, and for the benefit of the owner.*

THE opinion states the point.

A. W. Brases, for plaintiff in error.

Benedict & Phelps and *E. B. Sleeth*, for defendant in error.

BECK, C. J. [Omitting other points.] But we do not base our decision in this case upon either of the two points above mentioned. There is another point in the case that we consider fatal to the judgment below, which is, that soon after the seizure of the horses as estrays they were put to work by Hartman, and used by him in his business as livery horses, up to the day of trial, a period of about two years.

The excuse for this treatment, as given by said defendant, is that

* See *Murgoo v. Cogswell*, 1 E. D. Smith, 859.

they had to be kept twelve months before they could be sold under the estray law, and being kept in the stable, they were put to work so as to make them earn their feed. That Hall, his co-defendant, purchased them at the sale, and after that they were used as his horses.

It is not pretended here that any title passed by virtue of this sale, but it is strongly contended that defendants are entitled to the possession of the horses until the costs, charges and fees prescribed by sections 2565 and 2566, G. L., are paid by the plaintiffs, notwithstanding the fact that the sale was void.

This was the view taken by the District Court, and in accordance with the instructions given on the trial, "the jury found the ownership in the plaintiff, and the right to possession in the defendants."

This would be correct if it could be said that the original taking up was lawful, and that there has been since no abuse of the authority granted by the statute. It is well settled that a subsequent abuse of the authority will relate back to the seizure, and render the whole proceeding void from the beginning. If the taking up was unlawful, or if it has subsequently become unlawful, the taker-up forfeits all claim to compensation, and cannot defend an action for possession of the property on this ground.

The rule is stated in Bacon's Abr., page 451, that "When the law has given an authority it seems reasonable that the law should, in order to secure such persons as are the objects thereof from abuse of the authority, when it is abused, make every thing done void, and leave the abuser in the same situation as if they had done every thing without authority."

Defendant Hartman says the horses were put to work so as to make them earn their feed; his counsel argue that they were gently exercised for the benefit of their health, while the livery stable men and drivers say they were driven to hacks and worked the same as the other livery horses at the stable.

Defendant's counsel make the further point that the driving about publicly of estray horses is an advantage to the owner in affording better opportunities for the discovery of the animals, when it is done fairly, and with no intention to deceive, as in this case.

It would be a sufficient answer to this proposition to say the law is otherwise, but as to the driving being an advantage to the owner in this case, we may add the fact is also otherwise.

Weber v. Hartman.

One of these animals is a bay gelding, without brand or any distinguishing marks, except that the owner says he had a long, bushy tail when he went away.

The other animal is a sorrel mare, having white marks by which she could be easily identified. Now the manner of using them prior to the attempted sale was such as to render their identification difficult and improbable. The horses were not driven together, but with other animals, the horse being driven in the day-time, and the mare in the night-time ; when found by the owner, shortly after the sale, the horse had a short tail, and the owner swears that the bushy part of the tail was cut square off. The witnesses for the defense however swear that the hair was not cut off after he came to the stable, but that the horse may have worn it off somewhat, as horses usually do when driven to buggies or hacks. Admitting this to be so, the appearance of the horse would be changed, and being driven in livery with a mate closely resembling him in general appearance, it is doubtful whether the owner would have recognized him if he had seen him on the street.

The finding of the jury referred to by counsel, that Hartman acted in good faith in respect to the whole transaction, does not alter the facts of the case as they were shown to exist upon the trial. The question involved is not a question of good faith, but a question of law ; and considering it as such, we cannot regard the using of these horses in the manner described by the witnesses otherwise than as a gross abuse of the authority given by statute. Nor do we think that the supposed necessity, or the supposed benefits assigned therefor, afford any justification whatever.

The statute never contemplated the stabling and grain feeding of estray stock, as is evident not only from the expressions employed about *herding* and *ranching*, but from the rate of compensation allowed the taker-up. It provides that after filing a certain notice it shall be lawful for the taker-up to "*herd and take charge of said stock.*" G. L., § 2565. The next section allows him fifty cents per month for "*ranching the said stock.*"

The argument that the continuous working of estray horses in livery, as in this case, may be justified on the ground of necessity, assigning as such necessity that the animals require exercise to preserve them from injury, or a necessity to cut down the expenses of keeping them ; or to place it upon the ground of a benefit to the owner, as affording better opportunities for recognition, is not

only illusory and absurd, but is in contravention of legal principles.

The law from the earliest times has regarded the using of estrays, or distrained animals, as a tort, save only when the use was necessary to their preservation, as in the case of milk cows.

Blackstone says: "When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it has been held that the distrainer is not at liberty to work or use a distrained beast." 3 Bl. Com. *13.

The case of *Oxley v. Watts*, 1 T. R. 12, cited by counsel for plaintiff in error, was an action of trespass for taking a horse, tried before Lord MANSFIELD. The defendant justified taking the horse as an estray. It seems that the original taking was admitted to be lawful, but the court held that the subsequent using made the defendant a trespasser *ab initio*.

In *Sackrider v. McDonald*, 10 Johns. 252, it was held to be such an abuse of the power of distraining animals *damage feasant*, to impound them before the damages were assessed, as to render the original seizure a trespass. The opinion was delivered by KENT, C. J., who in discussing the principle of carrying back an abuse of authority to the original taking, says: "This was the settled rule of the common law, and it has been constantly and uniformly acknowledged by the courts; and the distinction is between an entry, authority or license given to one by law and by the party. If the authority is abused, the law in the first case adjudges, by the subsequent act, *quo animo*, the original entry was made, and makes the party a trespasser *ab initio*, but not so in the latter case, because the party cannot, for any subsequent cause, punish that which was done by his own authority."

The case of *Barrett v. Lightfoot*, 1 Mon. 241, was an action of trespass for illegally riding and killing a stray horse. The defense was that the defendant took up the animal as an estray, under the statute, and previous to the ten days allowed by law to post him as such, caused him to be used in a case of necessity to send for a physician. Upon demurrer the plea was held bad, and this ruling was sustained upon writ of error.

The question presented for decision was conceding it to be in general illegal to use an estray before posting, whether this case, by reason of the necessity that existed for the use, formed an exception.

Weber v. Hartman.

The court was not called upon to decide whether the rule was different after posting, but the reasoning of the court and the authorities cited make no distinction.

The first proposition announced is that if Barrett acted under the authority of law in taking up the horse, any subsequent abuse of that authority makes him a trespasser *ab initio*.

Barrett relied upon a case in Croke James, 148, as authority for using the horse, from which case the court quote the following paragraph: "It is not lawful for any to use it in any manner, unless in case of necessity and for the benefit of the owner, as to milk milch kine, because otherwise they would be spoiled; and so of the like. But to use a stray horse by riding or drawing is tortious, although it were alleged that the common course is to use stray horses with withes about their necks."

Upon the above citation the court comment thus: "It will at once be admitted that the case in Croke goes as well to establish the principle that strays cannot in the general be used, as that there may exist such a necessity for using them as to form an exception to the general principle, and render the use lawful." But to have that effect the necessity must, we apprehend, be of a different sort from that which is alleged in the plea of Barrett.

The illustration made by the court in the case cited shows the sense in which the expression, necessity, was intended by them, and proves conclusively that strays cannot lawfully be used by the taker-up, unless to use them be necessary to preserve them from injury, and for the benefit of the rightful owner. There being therefore no such necessity for using the horse by Barrett, alleged in this plea, the use was illegal, and an abuse of the authority of law, and as such the demurrer to the plea was correctly sustained.

The cases of *Nelson v. Merriam*, 4 Pick. 249, and *Adams v. Adams*, 13 id. 384, recognize the same doctrine of the foregoing authorities, and all are in accord with the ruling that the using of estrays, save as to the exceptions mentioned, is tortious, and that the taker-up forfeits his claim for compensation.

These views being in conflict with the theory upon which the cause was tried, and with the instructions of the court below, the judgment will be reversed and the cause remanded for further proceedings.

Reversed.

RICHARDSON V. BRICKER.

(7 Colo. 58.)

Limitations — promise to pay "when able."

A promise to pay a debt against which the statute of limitations has run, "when able," is conditional, and the creditor must prove the happening of the condition. (*See note, p. 847.*)

THE opinion states the case.

Thomas, McDougal and Thomas, and M. Benedict, for appellant, ex parte.

HELM, J. We will not determine whether in an action of this kind, without written pleadings, it is error, at the trial, to allow proof in rebuttal of a new promise after defendant has offered the statute of limitations in bar of the action. It appears from the record, though not from the abstract thereof, that plaintiff attempted to introduce evidence of the new promise, in chief, but that defendant objected, and the court ruled it out. We think that defendant is estopped from taking advantage of an error, if such it be, in the order of proofs, for which he is himself responsible.

Nearly eleven years passed between the maturity of the note and the commencement of suit thereon; plaintiff's action was therefore barred by our statute of limitations, and he could only recover upon proof of a new promise sufficient in law to revive the debt, or give him a new right of action therefor.

For this purpose but one witness was sworn; his testimony is somewhat ambiguous; he says in one breath that there was an unconditional promise to pay at a specified time, and in the next he admits that defendant promised to pay when "he got the money, or sold his coal land, or became able, or turned in some stock." But upon a careful consideration of his entire testimony, we think if it established any thing, it is that the new promise was to pay when able, or to pay on the 30th of the current month, provided a sale of some coal land was effected. No evidence whatever was offered by plaintiff to show that at the commencement of the

Richardson v. Bricker.

action defendant was able to pay the note, or that he had sold his coal land.

The suit is upon the contract created by the new promise, and therefore if such new promise be conditional, the plaintiff is not entitled to recover, except upon the performance or happening of such condition, and the burden of proving the same rests upon him. 2 Greenl. Ev., § 440, and note; Wood Lim. of Act., § 78, and notes.

If the new promise in this case was to pay the note upon the sale of coal lands, it clearly devolved upon plaintiff to prove such sale; so also if the new promise was to pay when able, we think it was plaintiff's duty to establish defendant's ability to do so.

Upon this question however there is some conflict of authority. In Illinois, Connecticut, Vermont and New Hampshire, it is held that promises to pay "when able," "as soon as possible," "when I can," "as soon as he could," were not conditional. It is said that these phrases following a promise are too uncertain to constitute a condition. *Horner v. Starkey*, 27 Ill. 13; *Cummings v. Gassett*, 19 Vt. 310; *Norton v. Shepard*, 48 Conn. 142; s. c., 40 Am. Rep. 157; *First Congregational Society v. Miller*, 15 N. H. 522.

But we think the weight of authority, as well as the better reason, supports the position that the promise to pay "when able" is conditional; of course the expression must be construed as referring to financial ability.

In this case the statutory bar had attached before the new promises were made. The debtor was under no legal obligation whatever to pay the debt. While the indebtedness itself was not cancelled, it could never be collected by judicial proceedings if he saw fit to invoke the statute. Whatever promise he made was entirely voluntary; and the authorities universally recognize his right to impose any condition which he might deem proper. By agreeing to pay when able, he practically declared that he would not bind himself unless he then had, or should thereafter acquire the means to do so; and it is difficult to understand how it can truthfully or logically be said that his promise was absolute and unconditional; the very language used indicates an intention not to renew the liability, except upon the conditions above mentioned.

It may be hard for the creditor to prove the debtor's financial ability, yet it is not more difficult for him to do this than to

prove a great many other conditions which might legally be imposed.

This is not a matter left to the debtor's discretion and judgment; his ability to pay is a question of fact for the jury, and that body might find that he was able to do so at the very time he made the conditional promise.

The law regards the creditor as culpable for not enforcing his demand within the statutory period, and the leading authorities are now decidedly against removing the bar of the statute and relieving him from the result of such negligence, except upon clear proof of a new promise and the performance or fulfillment of the conditions, if any, attached thereto. See generally upon this subject, 2 Greenl. Ev., § 440 and note, *supra*; Wood Lim. of Act., § 68; *Mattacks v. Chadwick*, 71 Me. 314; *Tompkins v. Brown*, 1 Den. 248; *Bidwell v. Rogers*, 10 Allen, 438; *La Forge v. Jayne*, 9 Penn. St. 410; *Sedgwick v. Gerding*, 55 Ga. 264.

No effort whatever was made to connect the letter offered in evidence by plaintiff with the particular debt upon which the action was brought. The letter itself does not refer to such indebtedness except by a strained implication. Considered alone, it entirely fails to establish such a clear and explicit acknowledgment of indebtedness as the law requires to constitute a new promise. It is not necessarily the acknowledgment of any debt whatever; for aught that appears therein, the money promised upon the sale of property may have been a loan to plaintiff.

It is questionable whether a general admission of indebtedness, however clear, is sufficient if it be not shown unmistakably to relate to the particular demand sued for, unless from the nature of the debt in controversy, or the particular circumstances connected therewith, a legal presumption fairly arises that such debt was referred to. Wood Lim. of Act. 155, and note 2; *Miller v. Baschore*, 83 Penn. St. 356.

But there is no question as to the insufficiency of such a doubtful and equivocal recognition of any indebtedness whatever as is contained in the letter under consideration.

The court erred in finding, upon the evidence adduced, that defendant made a new promise to pay the debt in controversy, sufficient to avert the statutory bar. The judgment resting upon such finding must be reversed and the cause remanded.

Reversed.

Salsbury v. Ellison.

NOTE BY THE REPORTER.— See 41 Am. Rep. 692. A statement by a person against whom a debt existed, but which was barred by the statute, and an insolvent's discharge, that he felt in honor bound to pay the debt, and would pay it, and at the end of one year if successful in business, he would commence paying it, is a conditional promise to pay the debt, and performance of the condition must be shown to authorize a recovery on such promise. Evidence of ability on the part of the debtor to pay, not having reference to the year's business referred to in the promise, is neither sufficient nor competent to show the condition performed. *Wakeman v. Sherman*, 9 N. Y. 85.

Tobo v. Robinson, 29 Hun, 243, was an action brought upon a promise made by the defendant in 1872 to pay to the plaintiff a sum then due to the latter, as soon as the defendant was able. The complaint alleged that the defendant had become able to pay such sum, but did not allege when he had first acquired such ability. The defendant denied none of the facts set forth in the complaint, but pleaded the statute of limitations. *Held*, that the statute began to run in favor of the defendant as soon as he became able to make the payment, and that it rested upon the plaintiff to show that such ability had been first acquired within the six years immediately preceding the bringing of the action. See also *Cocks v. Weeks*, 7 Hill, 46.

SALSBURY V. ELLISON.

(7 Colo. 167.)

Partnership—surviving partner—assignment for creditors.

The surviving partner of an insolvent firm may make a general assignment for creditors without preferences. (*See note, p. 851.*)

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

Harmon & Ellis, for plaintiff in error.

Platt Rogers and *R. H. Whitely*, for defendant in error.

HELM, J. B. F. Pine, Jr., being the surviving partner in the firm of B. F. Pine & Son, executed a written assignment of all the firm property to defendant in error. This assignment was for the benefit of the firm creditors, but gave preference to two of them. The firm being insolvent, Brinker, one of the creditors not so preferred, brought suit and recovered a judgment for the amount of his claim.

In aid of such suit he caused plaintiff in error, as deputy sheriff, to levy a writ of attachment upon the property three days subsequent to the assignment thereof. Thereupon defendant in error, the said assignee, instituted his action of replevin for possession of the goods. This action was successful, and the present writ of error was sued out of this court to reverse the judgment rendered therein.

At the trial of the cause the written assignment aforesaid was admitted in evidence over defendant's objection. This action of the court is assigned for error, and the most important questions presented rest upon this objection: can the surviving partner of an insolvent firm assign the partnership effects for the benefit of preferred partnership creditors? If he cannot do so, may the validity of such assignment be questioned in a legal action by a firm creditor, or must an equitable action be first instituted to cancel and set aside the same?

The surviving partner is a trustee, the firm property being the trust estate. The partnership creditors and the representatives of the deceased partner are the beneficiaries, there being also a beneficial interest in favor of the surviving partner himself; the sole purpose of the trust is the closing up of the partnership business, and payment of the surplus, if any, after settlement of the debts, to the proper parties.

In the performance of his duties the surviving partner is governed by the rules applying to ordinary trustees. His acts are scrutinized with the same care, and he is held to the same diligence and good faith as is required in the management of other trust estates. *Gillet v. Gaffney*, 3 Colo. 364.

His right to make an equitable and just assignment of the partnership effects and credits, for the equal benefit of all the creditors, is now recognized by a preponderance of authority. Such right is, we think, also recognized and regulated by section 68 of the General Statutes. When the assignment before us was executed however this act had not become a law. Therefore our present investigation is not governed or in any manner affected thereby. But an assignment for the benefit of preferred creditors, *the firm being insolvent*, is declared invalid by courts of the highest dignity and worth. In his position of trustee for all the firm creditors, the surviving partner is not permitted to sacrifice the interest of one by favoritism shown to another. If there be not sufficient partnership property to pay all the debts, equity and good conscience

Salsbury v. Ellison.

require that the trustee shall distribute the proceeds therefrom ratably among the creditors.

There are authorities which seem to hold that a surviving partner may prefer creditors in settling the firm obligations; but so far as we have been able to discover, with a single exception, there was no question of insolvency in the cases upon which such declaration rests. The reason for the rule prohibiting preference among the creditors did not exist, and therefore such cases do not militate against the correctness of the rule where such reason appears. If the firm assets are sufficient to pay all of the firm debts, so that each creditor will ultimately receive compensation in full, preference in the time or order of payment may not be inconsistent with the conditions of the trust.

The exception referred to is the case of *Egberts v. Wood*, 3 Paige, 526, in which the chancellor suggests that the representative of the deceased partner has "no interest in the question as to what debts shall be paid first in case the partnership effects are insufficient to pay the whole," and therefore an assignment for the benefit of preferred creditors cannot be impeached on the ground that such representative had no knowledge thereof. The suit was brought by a firm creditor. The assignment was not sustained, but the reason given for declaring it void was that one of the *surviving partners* had no knowledge thereof, and gave no consent thereto.

But counsel for defendant in error insist that the acts of the surviving partner in this respect can only be questioned in a court of equity. That his assignment for the benefit of preferred creditors cannot be attacked in a legal forum.

From the nature of the transactions and legal *status* of the parties interested, it is true that these questions more often arise in equitable actions. But such an assignment, insolvency appearing otherwise, is held void as against a creditor injured thereby. No investigation is necessary to disclose this fact, for the instrument, the assignor being insolvent, bears on its face evidence of its own invalidity. Where the void assignment is offered and relied upon by the party to be benefited thereby, there would seem to be no good reason why objection thereto may not under our practice be made in a court of law.

In the action of ejectment courts of law have long assumed the privilege of rejecting a void deed, and they have insisted upon a large concurrent jurisdiction with courts of equity in investigating

certain questions of fraud for the purpose of determining such invalidity. A resort to equity is necessary to set aside or cancel such an instrument and remove the cloud upon title; but the defect appearing on its face, or being disclosed in a proper manner, courts of law simply treat the deed as a nullity, and ignore its existence. We do not think that such an assignment as the one before us ought to receive any greater consideration or protection than a void deed to realty. And this is especially true under our present system of procedure.

Had plaintiff averred ownership of the property replevied, by virtue of the assignment, defendant would have met the averment with an allegation of fraud upon creditors in the assignment, and the issue made upon the question would have been fully tried. There being only a general allegation of ownership in the complaint, it would be unjust to say that defendant might not object to the instrument upon which such ownership and right to possession entirely depend, where the matters appearing on the face of the instrument itself, together with the evidence already before the court, establish the fact that the claim of ownership is without foundation.

It must be borne in mind that the proofs of plaintiff in making out his case (including evidence without objection in cross-examination) show beyond question the insolvency of the partnership at the time of the assignment; also the facts that the assignment was made for the benefit of the preferred creditors, and that Brinker was an unpreferred creditor to the extent of over \$3,000, and therefore plaintiff himself thus established a defense against his own action, which if properly averred would be decisive in a court of equity. It must also be remembered that under our practice an equitable defense is available in a legal action, and therefore defendant was entitled, upon proper averment, to prove the same as an affirmative defense in this case. He would not be permitted, after plaintiff makes out a *prima facie* case and rests, to offer evidence of a defense, either legal or equitable, which was not presented by the pleadings. But when the evidence of plaintiff in support of his case discloses a perfect defense, whether the same be equitable or legal, he will be deemed to have waived the defect arising from want of averment thereof in the answer, and defendant may have the benefit of such defense. This is especially true where, as in the case before us, defendant may not previous to the trial have infor-

People v. Green.

mation which would enable him to plead the defense in his answer.

Had the assignment been rejected by the court when offered in evidence plaintiff could not have recovered; having been received in connection with the other proofs, it established a defense and defeated his claim of right to possession of the property in controversy.

The judgment will be reversed and the cause remanded.

Reversed.

BECK, C. J., dissented.

NOTE BY THE REPORTER.—In *Loeschigk v. Hatfield*, 51 N. Y. 660, it was held that a surviving partner has power to assign and transfer the copartnership assets to a creditor of the firm in payment of his debt, although such an assignment operates to give a preference to the assignee over the other creditors of the firm.

PEOPLE V. GREEN.

(7 Colo. 237.)

Attorney — disbarring — contempt.

An attorney, stopping a judge on the street, and using abusive language to him concerning his judicial action in a case pending before him, is guilty of "misconduct in office," warranting disbarring.*

PROCEEDINGS to disbar an attorney. The opinion states the case.

D. F. Urmy, attorney-general, *L. S. Dixon* and *L. C. Rockwell*, for people.

B. F. Rice and *B. F. Montgomery*, for respondent.

BECK, C. J. The petition of the Hon. Victor A. Elliott, judge of the District Courts of the second judicial district of this State, recently filed in this court, charges the respondent, Thomas A. Green, a duly licensed attorney at law, residing in the city of Denver, with malconduct in his office as an attorney.

It charges that the respondent halted the relator as he was driv-

* See *Matter of Pryor* (18 Kana. 72), 26 Am. Rep. 747.

ing through the street with his daughter, a young lady, and addressed abusive, insulting and threatening language to him concerning his judicial action in a certain cause theretofore and still pending and undetermined in the District Court of Arapahoe county, wherein the said Green was counsel for the defendants; that he accused said judge with tyranny and oppression in said cause; that said relator had procured its submission to a prejudiced judge for trial; and further that the respondent assailed the relator with vile epithets, and threatened to expose him by publishing the said accusations in the newspapers.

Upon the filing of the foregoing petition a rule was entered herein that the respondent be cited to appear and show cause why his name should not be stricken from the roll for malconduct in office.

The respondent appeared and answered the petition, and a hearing has been had. The answer admits that the facts contained in the petition, descriptive of the respondent's alleged conduct, are substantially true as stated, but denies that he entertained the motives therein charged against him, to-wit, that he intended thereby to embarrass and intimidate the relator in the discharge of his official duties as judge of said courts, or to disgrace him as a judge.

There being no traverse of the substantial allegations of fact contained in the petition, for the purpose of testing the intentions of the respondent, an issue was framed presenting the question whether the respondent's conduct and language to Judge Elliott upon the street constituted such malconduct in his office as an attorney at law as to warrant this court in striking his name from the roll.

Upon the hearing the respondent was permitted to introduce testimony in mitigation of the offense charged against him, the same matters to be considered in justification, if adjudged admissible for that purpose. Testimony was likewise produced by the relator concerning the same matters of fact mentioned by the respondent's witnesses, and subsequently the case was submitted to the court upon the briefs and arguments of counsel for the respective parties.

Upon a careful consideration and review of the whole case, we are of opinion that the respondent's course has been unreasonable and unprofessional throughout.

People v. Green.

Reprehensible as his conduct has been, there is little doubt that a retraction of his acts and words at any time prior to the submission of the case for our judgment, accompanied by a proper apology to the District judge, manifesting a disposition to make suitable reparation for the indignity offered him, would have caused a dismissal of this proceeding.

But the attitude and bearing of the respondent have been, as to the relator, wholly defiant. His position is that he has done nothing wrong; that his conduct was justifiable, and that no occasion exists even for an apology on his part.

He makes the further point that the offensive language complained of, having been addressed to Judge Elliott out of court, the same does not constitute a statutory contempt, and for that reason it does not warrant the respondent's disbarment.

Such being his disposition and course in the matter, it only remains for us to declare the law applicable to the facts and circumstances of the case.

The language of the statute upon the subject of striking an attorney from the roll is broad and plain. It is : "The justices of the Supreme Court, in open court, shall have power, at their discretion, to strike the name of any attorney or counsellor at law from the roll for misconduct in his office." Gen. Stat., p. 136, § 5. The grave and delicate responsibility imposed upon this court, by the statute, is duly appreciated. The profession of an attorney is to him of the highest importance. It comprises his regular means of subsistence. No argument therefore is necessary to show that the power of striking from the roll should be most judiciously exercised. The case should be clearly made out to warrant a removal from the bar, and the removal should appear to be necessary either to the maintenance of that degree of respect which is due to courts and judges, or to preserve the respectability of the legal profession itself. The power should never be arbitrarily exercised.

It may be remarked, in this connection, that the statute not only vests this court with a discretion which may be exercised, but by implication it enjoins a solemn duty upon the court, which in a proper case must be exercised.

Said Chief Justice MARSHALL, "This discretion ought to be exercised with great moderation and judgment, but it must be exercised." *Ex parte Burr*, 9 Wheat. 529.

A proper regard for the integrity of our honored profession, and

for the preservation of judicial authority, requires that indignities of this character to judges, on account of rulings made in court, be summarily dealt with. Inaction under such circumstances would be a warrant for the perpetration of a similar outrage whenever an unreasonable or evil disposed lawyer might adjudge himself aggrieved by judicial action.

The necessary effect of an indecisive course in such a case would be to impair confidence and respect in judicial authority, and embarrass the administration of justice.

The law has made ample provisions for the correction of judicial errors, and law-abiding attorneys avail themselves of such remedies when occasion requires. Those otherwise disposed must suffer the consequences of an injudicious course of action.

Concerning the respondent's motives, we have his denial that his real motives were those attributed to him by the relator. It is true respondent assailed Judge Elliott upon the street with low epithets, interspersed with charges of corruption and tyranny, accompanied by threats of exposure through the newspapers, all on account of his official action in a cause still pending in the District Court, and on account of a publication concerning the same which criticised the course pursued by the respondent. But Mr. Green says he did not intend thereby to embarrass or intimidate the judge in the discharge of his official duties or to disgrace him as a judge.

We fail to discover any thing in the case however which should except it from the operation of the usual rule of determining the motives by which human conduct is actuated, viz.: that the natural and probable consequences of every act deliberately done were intended by its author.

The respondent was afforded an opportunity to prove on the hearing, in mitigation of his alleged offense, the affirmative allegations of his answer, that the District judge had treated him in an oppressive and tyrannical manner; that he had entrapped him into the submission of the *Bosco-Smith* case to a prejudiced and partial judge for trial, and that the relator caused the publication in the *Tribune* of a false and libellous account of the proceeding which occurred in court on the presentation by the respondent of his protest against further action before Judge ROGERS. He signally failed to sustain upon the hearing any one of these allegations.

His conduct is not palliated by the plea of sudden passion, suggested by his counsel, which was incited upon reading the news-

People v. Green.

paper article referred to, for in the first place said article was not grossly false as alleged, and the supposed wrong done the respondent by its publication was more fancied than real. In the second place, Judge Elliott had distinctly informed him before the respondent gave vent to the tirade of abuse charged, that he was in no manner responsible for its publication. However angry he may have been upon reading the article therefore, Judge Elliott having wholly disclaimed its authorship, no pretext remained on that account for his insulting words, and although uttered under excitement thus produced, his conduct was wholly inexcusable.

The right of lawyers, in common with other persons, to criticise in a legitimate manner the conduct and rulings of judicial officers is recognized, but this right never extends to nor justifies indignities to such officers concerning proceedings in court, which indignities would properly be characterized as outrages if perpetrated upon private citizens concerning other matters.

The respondent's objection to the jurisdiction of this court in this case is, in our judgment, not well taken. It is not necessary that the indignity or insult to a judge should occur in open court, nor that it constitute a statutory contempt of court, in order to confer on this court jurisdiction to disbar therefor.

Bearing upon this proposition the views of Mr. Justice FIELD are in point: "The obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. * * * Whatever may be thought in such a case of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll." *Bradley v. Fisher*, 13 Wall. 335.

Chief Justice SHARSWOOD, of Pennsylvania, is equally positive upon the point. Says he: "No question can be made of the power of a court to strike a member of the bar from the roll for official misconduct in or out of court." *Ex parte Steinman*, 95 Penn. St. 220; s. c., 40 Am. Rep. 637.

To the same effect are the views of Chief Justice ENGLISH: "The

Garvey's Case.

courts in the discharge of their official duties; but so far as this liberty of speech in connection with judicial action is concerned, his official character in no way affects him; he may talk with his neighbors, and freely comment upon the judge's official conduct in matters no longer pending, and he may criticise the same through the public press; for such acts he will be answerable only as other citizens are.

But we have found no case, and respondent has cited none, which extends this privilege of comment and criticism to assaults, verbal or physical, upon the judge in person. If a case like the one before us were found, in which the court exonerated the attorney from official reproach, we should hesitate long before following it.

The assault upon the judge in person, the vile epithets and threats addressed to him, cannot be justified or excused under the right of criticism, nor upon the plea of educating or informing the popular mind concerning his official acts.

We may accept the law as stated by counsel for respondent in their able brief upon this petition for rehearing. We may say with them that our power to disbar is confined to the statutory causes, and that it can only be exercised for malconduct in office, though both of these propositions are ably controverted.

Rehearing denied.

GARVEY'S CASE.

(7 Colo. 384.)

Criminal law — twice in jeopardy — repeal of statute.

The prisoner having been indicted for murder, the statute was so amended as to render it illegal to convict him of murder, and without any saving clause, but not so as to affect the crime of manslaughter. He was then tried and convicted of murder. *Held*, that he might be subsequently tried under the same indictment for manslaughter.*

HABEAS corpus. The opinion states the case.

Wells, Smith & Macon, for petitioner.

D. F. Urmy, attorney-general, for people.

* See same case (6 Colo. 559), 45 Am. Rep. 581.

Garvey's Case.

BECK, C. J. The petitioner was indicted for the murder of one George Wolf, alleged to have been perpetrated on the 23d day of May, 1880. The indictment was found by the grand jury on the 15th day of March, 1881, on which he was tried at the special November term of the District Court of Arapahoe county, 1881, found "guilty of murder as charged in the indictment," and sentenced to imprisonment for life in the State penitentiary.

A writ of error to the judgment was prosecuted to this court, and at the April term, 1883, we reversed the judgment and remanded the cause, for the reason that after the commission of the offense the legislature had so amended the statute concerning murder as to alter the situation of the prisoner to his disadvantage, without a saving clause as to the repealed provisions, thus making the law *ex post facto* as to the case of the petitioner.

The petition is demurred to by the attorney-general on behalf of the people, and it is stipulated by counsel representing the respective parties that the cause be heard upon this demurrer, and that the record upon the writ of error of *Garvey* (the petitioner) v. *People*, recently heard and determined in this court, together with the judgment of the District Court of Arapahoe county, subsequently rendered, denying the motion to quash the indictment, and entering judgment upon the former conviction, be considered as a part of the present petition for writ of *habeas corpus*.

Upon the return of the record in the District Court the petitioner moved to quash the indictment upon the ground that it was insufficient in law, as appeared from the judgment of reversal. The petition alleges that the court denied the motion to quash, and gave judgment on the same verdict, without any further trial of the prisoner, that he be confined in the State penitentiary for the term of eight years. Upon this judgment the prisoner was committed to the penitentiary, where he still remains in confinement, and to be released from which he has sued out from this court the present writ of *habeas corpus*.

The judgment complained of is a judgment for manslaughter.

The grounds of the present application appear to be:

First. That the condition of the law applicable to the case of the prisoner, at and since the time of his trial for murder, has been such that he could not lawfully be tried for any offense charged in the indictment in question.

Second. That the action of the District Court in pronouncing

Garvey's Case.

judgment for manslaughter without a trial by jury was without jurisdiction, and therefore null and void.

Upon the first proposition it is contended that the repeal of the provisions of the law of homicide, above alluded to, quashed the indictment, or left it in the same condition it would have been if no law authorizing an indictment for murder had ever existed. That if this be true, there could be no record in the District Court upon which punishment for any offense charged in the quashed indictment could be inflicted. The repeal of the statutory provisions had the same effect upon the indictment as if a demurrer thereto had been sustained on the ground that it charged no crime. There could not be a conviction of manslaughter, because it was quashed *in toto*, and not in part only. A demurrer, it is argued, would not have been sustained as to the charge of murder, and overruled as to the charge of manslaughter involved in the allegations constituting murder, but the indictment would have been quashed and the prisoner discharged.

Much prominence is given to the proposition that an indictment, or any pleading under a statute which is repealed after the filing thereof, is for all purposes absolutely null and void.

The act amending the Criminal Code was approved March 1, 1881; and while it did not go into effect until after the filing of the indictment on the 15th day of March, 1881, still the amendment of the statute did not wholly repeal or annul the indictment. The law of homicide was not repealed. Two sections concerning the punishment of murder were repealed; but no change was made in the provisions relating to manslaughter. This is but a lower grade of the same offense, or a constituent part of it, and necessarily committed in the perpetration of a murder. It is held in this class of cases that a count, properly framed, for the higher grade or offense contains all the essential elements of a count for the minor offense. In illustration of this principle, it was said in *Commonwealth v. Harney*, 10 Metc. 425, that an indictment for murder or manslaughter contains a full and technical charge of an assault and battery.

But it is further contended that the effect of the legislation referred to was to abolish the offense of murder so far as the petitioner is concerned; and this being done, he could not be convicted of manslaughter upon this indictment; for while manslaughter is included in every indictment for murder, there was here no indict-

Garvey's Case.

ment for murder; and it cannot be said that one crime contains another when there is no containing crime, or that an indictment for murder includes manslaughter, when there is no such offense as murder.

It would seem to be an extravagant proposition that as to the petitioner there is no such offense as murder. As stated in *Garvey v. People, supra*, there remained unrepealed of the law of homicide, in addition to the provisions relating to manslaughter and its punishment, the sections defining the crime of murder, providing the form of indictment, and imposing the death penalty upon such as should be convicted. True, the change made was such that the petitioner could not be lawfully convicted of murder, but there existed no space of time wherein the crime of murder was not an indictable statutory offense. The statutory definition of the crime of murder was substantially the common-law definition as given by Blackstone and Coke. 4 Bl. Com. *195. The same was true of the form of the indictment under the statute. It was substantially the common-law form.

The statutory definition of manslaughter was the same as defined at common law. 4 Bl. Com. *191. The law of manslaughter was amended in 1883, but there was a saving clause as to all cases pending, so that the amendment does not affect the petitioner. Now counsel for petitioner say: "It is admitted that in every valid indictment for murder voluntary manslaughter is also contained; but not in an indictment that has been quashed, repealed or rendered void as to the murder therein charged."

But the indictment, as a pleading, has never been quashed, repealed, or rendered void, either by legislative action or by the order of any court. The fact that circumstances have transpired since the offense was committed, which render the charge of murder therein contained inapplicable to the case of the petitioner, does not necessarily discharge him of manslaughter, which is a lower grade of the same offense. His liability to answer for the latter does not depend alone on the principle that it is an included offense, but that it is charged in the indictment as well.

We apprehend that the true tests in such a case by which to determine the validity of the indictment are: Is the offense for which the conviction is sought included in the crime charged in the indictment; and if so, is it sufficiently alleged?

Our Constitution provides that in criminal prosecutions the

accused shall have the right to demand the nature and cause of the accusation against him, which is nothing more than was required by the rules of the common law. We have seen that the statutory definitions of murder and manslaughter, as the same remained unrepealed after the legislation of 1881, were synonymous with the common-law definitions of the same offenses; and since the statute requires all trials to be conducted according to the course of the common law, except where another mode is pointed out in the Criminal Code, we may safely test the sufficiency of this indictment by its principles.

At common law the words "murder" and "manslaughter" appear to have been terms applied to designate different grades of the same offense, viz.: the felonious killing of a human being. All that distinguished one grade from the other were the words "malice aforethought." Bish. Stat. Cr., § 468.

In his work on Criminal Procedure, vol. 2, § 576, Mr. Bishop says: "Whether murder and manslaughter are to be called two crimes or one is matter only of words, not of ideas."

Certain crimes, including murder, were arranged in grades, one above another, and each higher offense, or grade of an offense, was said to contain all that was embraced in the one next lower, and something more. It was not necessary that the indictment for any offense should specify the name of the offense, provided it was in other respects sufficient, and in this class of crimes, whatever the offense alleged in the indictment, there might be a conviction of any other, if within the words of the allegation.

Mr. Bishop says the indictment for the higher form of the offense would almost necessarily be in such language as to include the lower; and referring to the subject of murder, says: "We have already considered what, in general terms, is the distinction between the indictment for murder and for manslaughter, the former merely requiring some allegations added which are not in the latter. In other words, the indictment for murder being founded on the statute which divided felonious homicide into the two degrees of murder and manslaughter, must contain those statutory terms which distinguished the higher from the lower." 2 Bish. Crim. Proc., §§ 576, 540; 1 id., §§ 416, 417, 418; 1 Bish. Crim. Law, § 798.

Mr. Wharton illustrates it as follows: "Thus if A. be charged with feloniously killing B., of malice prepense, and all but the fact of malice prepense be proved, A. may clearly be convicted of man-

Garvey s Case.

slaughter, for the indictment contains all the allegations essential to that charge; A. is fully apprised of the nature of it; the verdict enables the court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts." 1 Whart. Crim. Law, § 627.

In *McPherson v. State*, 29 Ark. 225, 233, the court say: "An indictment for murder charges also all the lower grades of felonious homicide, and a conviction for manslaughter may be had upon it."

No objection has been raised as to the form of the indictment in the present case so far as the charge of murder is concerned, and we feel warranted in saying that if any indictment in the common-law form contains all the allegations essential to the charge of manslaughter, then the indictment in this case is sufficient to sustain a conviction of that offense. If the proposition of petitioner's counsel was to be conceded, that the amendment of the statute abolished the crime of murder so far as the prisoner is concerned, the force of the proposition is expended when it is declared that he cannot be lawfully convicted of that grade of crime. But murder, as a criminal offense, was not abolished, and being primarily charged in the indictment, and the indictment being sufficient in form, it follows under the authorities cited that the offense of manslaughter is substantially charged therein.

In so far as the terms descriptive of the offense in the present case exceed the description of manslaughter, they do not vitiate the indictment, but may be treated as surplusage. 1 Bish. Crim. Proc., §§ 478, 479.

It was held in *Reed v. State*, 8 Ind. 200, that in an indictment for a homicide, charging murder, but defective as to that grade of crime, the word "murder" might be rejected as surplusage, and the prisoner put upon his trial for manslaughter. The same rule was announced in *Dias v. State*, 7 Blackf. 20, respecting the words "with malice aforethought."

The indictment in the case at bar, though not defective in form as to the higher offense or grade of the offense charged, charges an existing statutory grade of homicide, of which the petitioner cannot be convicted.

But there is no force in the suggestion, that if put upon trial for manslaughter, and the evidence should disclose that the killing was perpetrated with malice aforethought, there could be no conviction of the minor offense.

Garvey's Case.

This point was expressly adjudged in *Commonwealth v. McPike*, 3 Cush. 181, wherein it was held that it is no defense to an indictment for manslaughter that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was therefore murder. Also in *Barnett v. People*, 54 Ill. 325, in reference to the subsequent trial of the prisoner, who had been convicted of manslaughter upon an indictment for murder, the court say: "He could not be convicted on this trial for murder, but a new trial having been granted on the conviction for manslaughter, he might be, and was, properly tried again for the latter named crime. And although the proof might show that crime was perpetrated deliberately and with malice, still after such acquittal the conviction could only be for the lower grade of crime."

The foregoing conclusions and authorities sufficiently answer the propositions urged in behalf of the petitioner, that had a demurrer been filed to this indictment it must have been quashed *in toto*; that an original trial for manslaughter could not be had thereon, and that if the prisoner had been put to his trial for the minor offense, and the evidence disclosed a case of murder, he must have been discharged.

The proposition that the prisoner has been once in jeopardy, and for that reason could not be put upon his trial for manslaughter, is equally fallacious. Counsel say if the indictment would support a conviction for manslaughter at all it would have done so in the first instance, and not being convicted of this crime on the first trial, he cannot be put in jeopardy of it again. If the prisoner had been wholly acquitted there would be force in this assertion, but the fallacy of the reasoning is exposed by the authority cited in its support, viz.: 1 Whart. Crim. Law, § 551.

Mr. Wharton says: "The rule is that if the prisoner could have been legally convicted on the first indictment, upon any evidence that might have been legally adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not."

The whole section proceeds upon the supposition that the prisoner has been acquitted on the first indictment. The fact here is otherwise. The prisoner was convicted, and the judgment was reversed because the conviction was illegal.

The only other instance mentioned in this section as constituting

Garvey's Case.

a bar to further proceedings is where there has been a conviction on a defective indictment, followed by judgment and a performance of the sentence. This likewise is inapplicable to the case of the petitioner.

The cases of *Shepherd v. People*, 25 N. Y. 406, and the *Hartung* case, are mainly relied upon in support of the position assumed, that the petitioner cannot be subjected to another trial, but must be unconditionally discharged upon this writ. We agree with the attorney-general and assistant counsel for the State, that the *Hartung* case may be clearly distinguished from the case at bar. Every step in the *Hartung* case from its inception is shown to have been regular and legal. There was no error in the indictment, verdict or judgment. The conviction and judgment were in all respects valid when had and pronounced. The judgment was reversed because the legislature had subsequently enacted a statute which forbade the execution of the death sentence that had been pronounced. The reversal of the judgment therefore was not based upon error in any of the proceedings in court, but upon matter wholly *dehors* the record. When it is considered that the prisoner might have been executed before the repeal of the law, the cause of the reversal, and which may be termed an accidental circumstance, it is but rational to say that he was once in jeopardy.

But it is asserted that the *Hartung* case was not so strong for an absolute discharge of the accused as this case, for the reason that all the proceedings there were legal, whereas every step in this case was illegal, except the indictment, and that, say counsel, was valid when found, but by the repeal of the law it became mere waste paper.

These conditions are evidently based on false premises. As before stated, the indictment was not invalidated, as a pleading, by the repeal of the law. And if the proceedings attending the trial were so grossly illegal, as alleged, how, upon reversal of the judgment, they would constitute a bar to another trial, especially in view of the provisions of our Constitution, we do not perceive. The admission of the facts assumed would seem to conclusively establish the converse of the proposition.

Sec. 18, art. 2 of the Constitution provides as follows: * * *
“Nor shall any person be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.”

 Murphy v. Hobbs.

This judgment was reversed for errors of law, which consisted in the trial, conviction and sentence of the petitioner for murder, whereas his offense under the law, applicable to his case at the time of his indictment and conviction, was manslaughter.

The case of *Shepherd v. People, supra*, does not seem to have involved similar constitutional provisions.

[Minor matter omitted.]

Our conclusion is that the imprisonment, under the judgment complained of, is illegal, for the reason that the judgment of the District Court is not merely erroneous, but void, and for that reason, and because of the non-observance of the forms of law in the proceedings of the District Court, the petitioner must be discharged from the penitentiary. But it appearing to this court that he stands legally indicted of a felony, the order will be that the petitioner be discharged from the penitentiary, and that he be remanded to the custody of the sheriff of Arapahoe county.

It is further ordered that said sheriff admit the petitioner to bail upon his executing a bond in the sum of \$5,000, with sufficient sureties, and in form and condition as required by the Habeas Corpus Act, said bond to be approved by the sheriff of Arapahoe county.

MURPHY V. HOBBS.

(7 Colo. 541.)

Damages — exemplary — tort punishable as a crime.

In a civil action for a tort punishable as a crime exemplary damages may not be awarded.*

MALICIOUS prosecution and false imprisonment. The opinion states the case. The plaintiff had judgment below.

Wm. B. Mills, for appellant.

Haynes, Dunning & Haynes, and *Rhodes, Love & McCreery*, for appellee.

**Contra, Smith v. Bagwell* (19 Fla. 117), 45 Am. Rep. 12.

Murphy v. Hobbs.

HELM, J. This is a civil action, brought to recover damages for malicious prosecution and false imprisonment. Plaintiff procured a verdict, and judgment was duly entered thereon. Defendant prosecutes this appeal and assigns in support thereof numerous errors. The most important of these assignments is one which relates to the measure of damages adopted in the court below.

Upon this subject the following instruction was there given: "That the measure of damages in an action for malicious prosecution is not confined alone to actual pecuniary loss sustained by reason thereof; but if it is believed, from the evidence, that the arrest and imprisonment stated in the complaint were without probable cause, then the jury may award damages to plaintiff to indemnify him for the peril occasioned to him in regard to personal liberty, for injury to his person, liberty, feelings and reputation, and as a punishment to defendant in such further sum as they shall deem just."

By the assignment of error and argument challenging the correctness of this instruction, we are called upon to consider the following question, viz.: Can damages, as a punishment, be recovered in cases like this?

The rule allowing, under certain circumstances, in civil actions based upon torts, exemplary, punitive or vindictive damages, for the purpose of punishing the defendant, has taken deep root in the law. It has the sanction of learned courts and law writers, among the latter Mr. Sedgwick; and its abrogation should be favored only upon the most weighty consideration. But we find denying its correctness, Professor Greenleaf and several courts of the highest respectability.

As we shall presently see, the question is not conclusively *res judicata* in Colorado. We therefore feel at liberty to inquire into the reasons urged against the doctrine.

Were this subject now presented to the various courts of the country for the first time, we have little doubt as to what the verdict would be; the propriety of adhering exclusively to the rule of compensation appears, upon careful investigation, with striking clearness. But many of the courts, like that of Wisconsin, while expressing strong disapprobation of the doctrine "inherited," and declaring it "a sin against sound judicial principle," feel constrained to preserve it, on account of precedent in their respective States, and the "current of authority elsewhere." *Brown v. Swineford*, 44 Wis. 282.

Perhaps the most impressive objection to allowing damages as a punishment in cases like the one at bar is that which relates to dual prosecution for a single tort. Our State Constitution declares that no one shall be twice put in jeopardy for the same offense. A second criminal prosecution for the same act after acquittal, or conviction and punishment therefor, is something which no English or American lawyer would defend for a moment. But here is an instance where practically this wrong is inflicted. The fine awarded as a punishment in the civil action does not prevent indictment and prosecution in a criminal court. On the other hand, it has been held that evidence of punishment in a criminal suit is not admissible even in mitigation of exemplary damages in a civil action. *Cook v. Ellis*, 6 Hill, 466; *Edwards v. Leavitt*, 46 Vt. 126.

Courts attempt to explain away the apparent conflict with the constitutional inhibition above mentioned; they say that the language there used refers exclusively to criminal procedure and cannot include civil actions. *Brown v. Swineford*, *supra*. But this position amounts to a complete surrender of the evident spirit and intent of that instrument. When the convention framed, and when the people adopted the Constitution, both understood the purpose of this clause to be the prevention of double prosecutions for the same offense. Yet under the rule allowing exemplary damages, not only may two prosecutions, but also two convictions and punishments, be had. What difference does it make to the accused, so far as this question is concerned, that one prosecution takes the form of a civil action, in which he is called defendant? He is practically harassed with two prosecutions and subjected to two convictions; while no hypothesis, however ingenious, can cloud in his mind the palpable fact that for the same tort he suffers two punishments.

An effort has been made to mitigate the undeniable hardship and injustice by declaring that juries in the second prosecution, whether it be civil or criminal in form, may consider the punishment already inflicted. But both reason and authority conclusively show that this proposition is illusory; that the application of such a rule is impracticable; and that the attempt to apply it, while producing confusion, would not effectively accomplish the purpose intended.

A second weighty objection to the rule under discussion relates to procedure. It is doubtful if another instance can be found within the whole range of English or American jurisprudence,

Murphy v. Hobbs.

where the distinctions between civil and criminal procedure are so completely ignored. Plaintiff sues for damages arising from the injury done to himself. His complaint or declaration is framed with a view to compensation for a purely private wrong; it need not be under oath, and does not inform defendant that he is to be tried for a public offense. The summons makes no mention of punishment; it simply commands defendant to appear and answer in damages for the private injury inflicted upon plaintiff. When the cause is called for trial, no issue upon a public criminal charge is fairly presented by the pleadings.

A trial and conviction are had, and punishment by fine is inflicted, without indictment or sworn information.

The rules of evidence peculiarly applicable in criminal prosecutions are rejected.

The doctrine of reasonable doubt is replaced by the rule controlling in civil actions, and a mere preponderance in the weight of testimony warrants conviction; defendant is compelled to testify against himself, and such forced testimony may produce the verdict under which he is punished; depositions may be read against him, and thus the right of meeting adverse witnesses face to face be denied.

The law fixes a maximum punishment for criminal offenses, and in this State the presiding judge determines the extent thereof, where a discretion is given; but under the rule we are considering, the jury are entirely free from control, except through the court's power — always unwillingly exercised — to set aside the verdict; they may, for an offense which is punishable under criminal statutes by \$100 fine at most, award as a punishment many times that sum.

And finally, when the defendant has been punished in the civil action, he is denied the privilege of pleading such expiation in bar of a criminal prosecution for the same offense. He can hope for no executive clemency in the civil suit; and if imprisoned upon the second conviction, under the authorities, *habeas corpus* does not lie to aid him.

The incongruities of this proceeding are not confined to the criminal branch of the law. Civil actions are instituted for the purpose of redressing private wrongs; it is the aim of civil jurisprudence to mete out as nearly exact justice as possible, between contending litigants; there ought to be no disposition to take from

the defendant or give to the plaintiff more than equity and justice require.

Yet under this rule of damages these principles are forgotten, and judicial machinery is used for the avowed purpose of giving plaintiff that to which he has no shadow of right. He recovers full compensation for the injury to his person or property; for all direct and proximate losses occasioned by the tort; for the physical pain, if any, inflicted; for his mental agony, lacerated feelings, wounded sensibilities; and then in addition to the foregoing, he is allowed damages, which are awarded as a punishment of defendant and example to others. Who will undertake to give a valid reason why plaintiff, after being fully paid for all the injury inflicted upon his property, body, reputation and feelings, should still be compensated, above and beyond, for a wrong committed against the public at large? The idea is inconsistent with sound legal principles, and should never have found a lodgment in the law.

The reflecting lawyer is naturally curious to account for this "heresy" or "deformity," as it has been termed. Able and searching investigations, made by both jurist and writer, disclose the following facts concerning it, viz.: That it was entirely unknown to the civil law; that it never obtained a foothold in Scotland; that it finds no real sanction in the writings of Blackstone, Hammond, Comyns or Rutherford; that it was not recognized in the earlier English cases; that the Supreme Courts of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan and Georgia have rejected it in whole or in part; that of late other States have falteringly retained it because "committed" so to do; that a few years ago it was correctly said, "At last accounts the Court of Queen's Bench was still sitting hopelessly involved in the meshes of what Mr. Justice QUAIN declared to be 'utterly inconsistent propositions.'" And that the rule is comparatively modern, resulting, in all probability, from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases.

See Professor Greenleaf's response to Mr. Sedgwick's criticism of the former's views on this subject, 2 Greenl. Ev. 235 *et seq.*; also the opinion of the court, delivered by Mr. Justice FOSTER, in *Fay v. Parker*, 53 N. H. 342; s. c., 16 Am. Rep. 270; and other authorities cited at the end of this discussion.

Mr. Parsons, while with evident reluctance sanctioning the rule,

Murphy v. Hobbs.

makes the following declaration: "We cannot believe that it was ever a principle of the ancient and genuine common law that damages should be punishment, or that the civil remedy for the wrong done should be punitive to the wrong-doer as well as compensative to the sufferer." 3 Pars. Cont. (6th ed.) 171.

The words "smart money," and also the following adjectives, have been used to designate this class of damages; speculative, imaginary, presumptive, exemplary, vindictive and punitive or punitive. The literal meaning of all but the last three is easily reconcilable with the idea of compensation; they were so used in the first place; and even as to the excepted ones, there are many cases wherein it is evident they were employed without any intentional reference to punishment. These words all came into use through the beneficent design of courts to distinguish between private wrongs with, and those without an evil intent, and to extend the right of recovery, in the former case, to injuries excluded from computation in the latter.

Mr. Justice FOSTER concludes a discussion of the expression smart money, as used by Grotius and jurists contemporary with that author, in the following language: "It is interesting, as well as instructive, to observe that one hundred and twenty years ago the term smart money was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not as now, money required by way of punishment, and to make the wrong-doer smart." *Fay v. Parker, supra*.

So long as the jury are considering the material pecuniary injury, direct or approximate, shown by the evidence, and the physical pain, their inquiry relates to what are termed actual damages; but when authorized by a vicious intent of the wrong-doer, they turn to the realm of mental anguish, public indignity, wounded sensibility, etc., the damages awarded may more appropriately be described as presumptive, speculative, or imaginary. The injury in the latter case is no less actual or real than in the former, but it is less tangible; compensation therefor is more a matter of judgment, less a result of computation.

A misapprehension seems sometimes to exist as to the word compensatory, when used in this connection. Under the rule limiting them to compensatory damages, juries will, with proper instructions, recognize a broad distinction between a tort unaccompanied

by malice, or circumstances of aggravation or disgrace, and one producing equal direct pecuniary damage where either of these conditions exist. In the former case they consider only the actual injury to the person or property, including expenses, loss of time, bodily suffering, etc., occasioned by the wrongful act; in the latter, they allow such additional sum as in their judgment is warranted by the circumstances of contumely, anguish or oppression; but in both instances the damages are awarded as compensation; the additional sum is given to the individual as a recompense for the mental suffering, or wounded sensibilities, etc., as the case may be. It often happens that this constitutes the principal element of the recovery.

If upon a crowded thoroughfare one maliciously assaults me with blows and epithets, \$5 may fully compensate the injury inflicted to my person and clothing; but \$500 may be utterly inadequate to requite the sense of insult, the personal indignity, the public disgrace and humiliation. The extra \$500 exacted may operate indirectly as a punishment; it may constitute an example to others, and also deter my assailant himself from repetitions of the offense in future; in law, however, it is simply compensation for the private wrong; a kind of indemnity which probably no court has ever refused to allow, when warranted by the circumstances.

But under the doctrine of exemplary damages, as announced by the instruction given in this case, the jury are not required to stop with the \$5 for material injury, and \$500 for lacerated feelings. They may turn to the domain of criminal law, and consider the public wrong; and they may add \$1,000 more as a punishment to my assailant. The arrangement is highly satisfactory to me, since I have the pleasure of pocketing the additional thousand dollars to which I am not entitled. But as we have already seen, it hardly comports with correct legal principles.

The case at bar furnishes a good illustration of the doctrine under discussion. The jury are told that if they find certain facts to exist, they may award damages to plaintiff for,

- 1st. The actual pecuniary loss sustained.
- 2d. The peril occasioned in regard to personal liberty.
- 3d. The injury to his person and liberty.
- 4th. The injury to his feelings and reputation.
- 5th. The punishment of defendant.

Murphy v. Hobbs.

The first four items comprise all the injuries for which plaintiff ought to recover; they all rest upon the theory of compensation for the private wrong, and are therefore in perfect harmony with the principles and procedure in civil actions; they furnish ample ground for discrimination by the jury, should they find the prosecution and imprisonment to have been malicious. Why not remit the punishment of defendant to a criminal forum?

The jury rendered a verdict for \$2,780. How much of this sum was given as a punishment? Perhaps \$1,000, perhaps more; yet under our Criminal Code, \$500 would have been the maximum. When defendant is on trial in the criminal court, he cannot plead in bar payment of this penalty; he must, if convicted, discharge the additional fine assessed, or go to jail, if such be the sentence. Whatever may be the technical distinctions, he is in fact twice prosecuted, twice convicted and twice punished for the same offense; and one of these prosecutions, convictions and punishments is had without any regard for the leading principles obtaining in criminal procedure.

Concerning defendant's liability to indictment for false imprisonment under our statute, see *Slomer v. People*, 25 Ill. 70.

We are not prepared to say with Mr. Field, that the controversy of the books about compensatory and exemplary damages "is one which relates more to the use of terms than to practical results," Field Dam., § 73; nor with Judge COLE of Iowa—for whose legal acumen and views we entertain profound respect—that the difference on this subject between Prof. Greenleaf and Mr. Sedgwick may be only a "controversy as to the terminology of the law, rather than as to the extent of the right of recovery, or the real measure of damages."

These remarks must be based upon the supposition that the jury would award as heavy damages under the liberal rule of compensation above stated as they would with the added element of punishment; a conjecture which it seems to us is hardly defensible from a legal standpoint. We deem no further argument necessary to show that the question is one of weighty importance. That it affects the fundamental distinctions between civil and criminal procedure; that it bears directly upon the legal rights, and in many cases also upon the constitutional rights, of the citizen.

In some of the States courts distinguish between cases where the tort is punishable as a crime, and those where it is malicious

but not so punished, exemplary damages being denied in the former, but allowed in the latter. See Sutherland Dam. 738, and cases cited.

This distinction rests upon the constitutional and humane objections to dual prosecutions and punishments for the same offense; but grave doubts may justly exist as to the wisdom of preserving it.

The impropriety of judicially recognizing as criminal that which is not so by statute or at common law; the incongruity and confusion arising from trial and punishment under the rules of evidence, pleading and practice controlling in civil actions; the injustice of denying defendant the benefit of principles and procedure maintained in criminal prosecutions; the manifest inequity of awarding plaintiff something to which he is not entitled—these and other considerations may prove so powerful as ultimately to undermine everywhere the distinction above-mentioned.

It may in the end be considered safer and better, in all cases, to keep the two forums separate and distinct; to let the public protect itself through legislation and the principles of the common law. It is not unlikely that courts will in the course of time generally condemn the practice of blending the interests of the individual with those of society, and using a purely private action to redress a public wrong.

The most difficult cases in which to exclude the rule of damages as a punishment are those where its application rests upon gross negligence, and where no criminal prosecution can be sustained; there is often a feeling that complete justice cannot be done without punitive satisfaction. But those courts which adhere to the doctrine of exemplary damages in general are by no means unanimous in applying it to this class of cases; and when so applied, the most guarded language is used, and the most careful limitations are imposed; it is said that the negligence must be "flagrant and culpable;" so much so that malice may "well be inferred or imputed to defendant." Field Dam., § 84, and cases cited.

Why may not even this class of cases be safely limited to the rule of compensation? Is not this doctrine, as above explained sufficient to meet all the reasonable demands of justice?

But it is sufficient for us to say that, in the case at bar, the objections to double prosecutions and punishments for the same offense are decisive.

Murphy v. Hobbs.

As already suggested, the distinction above considered is not merely verbal. It makes but little difference what adjective or expression is used to designate the damages beyond those termed actual which may be awarded by the jury for injury, to the feelings when the wrong is accompanied by malice, provided the instructions clearly indicate the proper limitation. But it is believed safer not to employ the words exemplary, vindictive, punitive, or either of them, as there is danger of misapprehension growing out of their literal meaning, notwithstanding the accompanying explanations of the court.

It has been with no little reluctance that we have arrived at the foregoing conclusion as to the doctrine of punitive or exemplary damages. The persuasive reasons and strong array of authorities in support of the rule, the corresponding convictions of a large part of the bench and bar of the State, and the confusion that may exist for a time, have impelled us to the most careful and conservative deliberation. But we feel that the doctrine of compensation as explained is more in consonance with the reason, the logic, the science of the law; that it is more in harmony with the dictates of equity and justice, and that the tendency of the courts and writers is favorable to its exclusive adoption, more correctly speaking, re-adoption. We deem it wiser to accept and declare the rule now than to resist for a time and ultimately be compelled to do so, when the confusion produced would be tenfold greater than at present is possible.

Upon the subjects embraced by the foregoing discussion, see the following authorities supporting or opposing the views adopted in this opinion. 2 Greenl. Ev. (13th ed.), text, notes and cases, p. 235 *et seq.*; 1 Sutherland Dam., text, notes and cases, p. 716 *et seq.*; Field Dam., text notes and cases, p. 64 *et seq.*; Sedg. Dam. (6th ed.), text, notes and cases, p. 552 *et seq.*; 3 Pars. Cont., text, notes and cases, p. * 169 *et seq.*; *Fay v. Parker*, 53 N. H. 342; s. c., 16 Am. Rep. 270.

Several cases decided by this court refer directly or indirectly to the subject of exemplary damages, viz.: *Kinney v. Williams*, 1 Col. 191; *Nachtrieb v. Stoner*, id. 423; *K. P. R'y Co. v. Miller*, 2 id. 442; *Western Union Tel. Co. v. Eyser*, id. 141; *K. P. R'y Co. v. Lundin, Adm'r*, 3 id. 94; *Wall v. Cameron*, 6 id. 275.

In none of these cases does there appear to have been a serious contest upon this subject by counsel. It is not considered at any

Murphy v. Hobbs.

length or fairly adjudicated in either of the opinions, though they contain remarks which seem to recognize the doctrine. In five of the cases the judgments below were reversed — four by this court and one by the Supreme Court of the United States; and with a single exception the principal ground of reversal was error in submitting at all to the jury this branch of the measure of damages. Therefore for this reason in four of those cases it was not necessary to determine the question, since if the rule were held to exist, it had no application. In one of the remaining two, the reference to this class of damages was a casual remark by the judge who wrote the opinion, not necessarily required by any thing in the record. While in the sixth, the instruction considered, simply told the jury that if malice existed, they were “not restricted to the mere corporeal injury of the party,” which is in perfect keeping with the rule of compensation above announced.

But if it can be truthfully claimed that the views herein expressed are not in harmony with those cases or either of them, we feel constrained to hold, that to the extent of such conflict, those opinions should be modified.

[Omitting other matters.]

Reversed.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

EDWARDS V. COMMONWEALTH.

(78 Va. 89.)

Pardon — effect as to second offense.

When an additional punishment is prescribed for a second offense, pardon of the first offense takes away the right to inflict it.

CONVICTION of felony. The opinion states the case.

George Bryan, for prisoners.

F. S. Blair, attorney-general, for Commonwealth.

LEWIS, P. The statute provides that when a person is convicted of an offense and sentenced to confinement therefor in the penitentiary, and it appears in the manner prescribed that he has before been sentenced in the United States to a like punishment, a term of five years' confinement shall be added to the term for which he is or would be otherwise sentenced. Code 1873, ch. 195, § 25 ; Acts of Assembly 1877-78, p. 315, § 25.

At the March term, 1883, of the Corporation Court of the town of Danville, the plaintiff in error was convicted of a felony, and

sentenced to imprisonment therefor in the penitentiary. On the 6th day of July following, under the provisions of chapter 208 of the Code (now Acts of Assembly 1877-78, p. 371) he was arraigned in the Circuit Court of the city of Richmond, upon an information filed by the attorney for the Commonwealth, alleging that he had been convicted of a felony in the said Corporation Court on the 9th day of March, 1881, and sentenced therefor to imprisonment in the penitentiary. The information was filed upon information given to the said Circuit Court by the superintendent of the penitentiary, in whose custody the accused then was in pursuance of the sentence pronounced by the said Corporation Court at its March term, 1883. The accused, upon his arraignment, pleaded in bar of the proceedings a full pardon of the governor for the first offense, which was granted on the 25th day of April, 1882. The attorney for the Commonwealth demurred to the plea, and the demurrer was sustained, and the accused afterward sentenced to undergo a further confinement in the penitentiary for the term of five years, commencing from the expiration of the term of confinement he was then undergoing.

The single question now to be determined relates to the operation and effect of the pardon relied on.

A pardon is defined to be a remission of guilt. Its effect, under the English law, is thus stated by Hawkins in his Pleas of the Crown : " The pardon of a treason or felony, even after a conviction or attainder, does so far clear the party from the infamy of all other consequences of his crime that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction ; because the pardon makes him, as it were, a new man."

In the early case of *Cuddington v. Wilkins*, Hob. 81, the plaintiff brought an action against the defendant for denouncing him as a thief. The defendant pleaded that the plaintiff had been guilty of stealing six sheep. The plaintiff replied that after the felony, and before the publication of the objectionable words, he had been pardoned by a general pardon. Upon demurrer the replication was held good. The whole court were of opinion that though the plaintiff were a thief once, yet the effect of the king's pardon was not only to relieve him of the punishment imposed, but to clear him of the crime and infamy.

Edwards v. Commonwealth.

Blackstone says the effect of a pardon by the king is to make the offender a new man, to acquit him of all corporal penalties and forfeitures annexed to the offense for which the pardon is granted, and to give him a new credit and capacity.

The same principles apply to a pardon of the president of the United States. *United States v. Wilson*, 7 Pet. 150. In *ex parte Garland*, 4 Wall. 333, the Supreme Court held that the petitioner, having received a full pardon for all offenses by him committed arising from participation in the rebellion, was relieved from all penalties and disabilities attached to the commission of his offense, and was placed beyond the reach of punishment so far as that offense was concerned; that it was not within the constitutional power of Congress to inflict punishment beyond the reach of executive clemency, and accordingly that he could not be excluded, by reason of the offense for which he had been pardoned, from continuing in the enjoyment of the right previously acquired to appear as counsellor and attorney in that court.

In delivering the opinion of the court, Mr. Justice FIELD said : "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full, it relieves the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching ; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights — it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation : it does not restore offices forfeited, or property or interest vested in others in consequence of the conviction and judgment." And the same learned judge, in delivering the opinion of the court in the later case of *Carlisle v. United States*, 16 Wall. 147, said : "There has been some difference of opinion among the members of the court as to cases covered by the pardon of the president, but there has been none as to the effect and operation of a pardon in cases where it applies. All have agreed that the pardon not merely releases the offender from punishment prescribed for the offense, but that it obliterates in legal contemplation the offense itself." In *Osborn v. United States*, 91 U. S. 474, the court say : "It is of the very

essence of a pardon that it releases the offender from the consequences of his offense." And to the same effect are all the authorities.

By the Constitution of Virginia, the governor is empowered to grant reprieves and pardons after conviction except when the prosecution has been carried on by the house of delegates, and to remit fines and penalties in such cases and under such rules and regulations as may be prescribed by law. He is also empowered to remove political disabilities consequent upon conviction for offenses, and to commute capital punishment. Const., art. IV, § 5.

It will thus be seen that certain restrictions are here imposed upon the exercise of the pardoning power which are not found in the laws of England or of the United States. But subject to these restrictions, the effect of the governor's pardon must be determined by the same rules which apply to a pardon by the British crown or by the president of the United States.

By the pardon in question therefore the plaintiff in error was not only relieved of the punishment annexed to the offense for which he had been convicted, but of all penalties and consequences, except political disabilities, growing out of his conviction and sentence. One of those consequences was the liability to which it subjected him to receive the additional punishment prescribed by the statute, in case he should be afterward sentenced to the penitentiary in this State. And that additional punishment has been imposed in this case, not by reason of the sentence for the second offense alone, but in consequence of that sentence and the sentence in the former case. Both causes must exist together to produce the effect contemplated by the statute ; in the absence of either, no case is made for the imposition of the additional punishment the statute prescribes. But as the first offense was in legal contemplation blotted out, and its consequences removed by the pardon of the governor, it must be regarded, for the purposes of this case, as though it had never been committed. It follows therefore that the judgment of the Circuit Court, sustaining the demurrer to the prisoner's plea, is erroneous and must be reversed.

A like order will be entered in the case of *Anderson v. Commonwealth*, in which the same question is involved, and was heard with this.

Judgment reversed.

Birch v. Linton.

BIRCH V. LINTON.

(78 Va. 584.)

Infancy — coverture — disaffirmance of deed.

A female infant conveyed her land, and afterward married in infancy. On marriage she left the State. She came of age in 1858. In 1876 she and her husband brought ejectment for the land. Meantime she had been absent and silent, and the grantee had made improvements. *Held*, maintainable.*

EJECTMENT. The opinion states the facts. The plaintiff had judgment below.

H. O. Claughton, Charles E. Stewart and L. Marbury, for plaintiff in error.

E. Burke, for defendants in error.

HINTON, J. This is an action of ejectment brought by the defendants in error, Phillip H. Linton and Martha A. Linton, his wife, against the plaintiff in error, John T. Birch, in the Circuit Court of the county of Alexandria, to recover sixteen acres of land lying in said county, and for the mesne profits accruing during the five years next preceding the action.

During the progress of the trial the defendant requested the court to give four instructions; but it refused to do so, and in lieu thereof gave one of its own; and this action of the court constitutes the first ground of exception.

The refusal of the court to set aside the verdict which the jury found for the plaintiffs constitutes the second ground of exception.

The evidence was not conflicting, and the court has certified it as being the facts proved. It shows that on the 9th of June, 1855, Robert Birch and Mary, his wife, conveyed to his niece, Martha A. Birch, the lot of land in question, and that on the 8th day of September, 1857, the said Martha A. Birch, who was then an infant, conveyed the same land to a trustee for the sole and separate use of her stepmother, Jane C. Birch, with power to dispose of it in any manner she might think proper. This last mentioned deed was recorded on the 9th of September, 1857, and on the next day this

* See *Goodnow v. Empire Lumber Co.* (81 Minn. 468), 47 Am. Rep. 798.

infant, Martha A. Birch, married her present husband and co-plaintiff, Phillip H. Linton, and went with him to the State of Maryland, where they have resided ever since.

On the 11th day of April, 1865, Jane C. Birch, her trustee and her husband uniting, conveyed the said property to the defendant. On the 22d of April, 1858, the infant, Martha A. Linton, became of age, and on the 6th of September, 1875, the present action was commenced by herself and husband.

That the conveyance of land by an infant is voidable, and that he may, after attaining his majority, affirm or disaffirm it, is now well settled. But what amounts to an affirmance or a disaffirmance by an infant of his deed seems still to be a subject of dispute, as to which there is a considerable conflict of authority. The prevailing opinion however seems to be not only that acts which would be insufficient to avoid a deed may amount to an affirmance of it, but that mere silence, for any length of time less than the statutory period, which would bar an action of ejectment, when unaccompanied by some act of a confirmatory nature, will not suffice for that purpose. Upon this point the Supreme Court of the United States, in a late case, says: "The preponderance of authority is, that in deeds executed by infants mere silence or inertness, continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts, manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed." *Sims v. Everhardt*, 102 U. S. 310. And to the same effect is the statement of Mr. Tyler, an author of acknowledged merit, who says: "That by the authorities in this country it would seem ordinarily that a conveyance of real estate by an infant may be disaffirmed at any time, so long as an action of ejectment is not barred by the statute of limitations." Tyler Inf. and Cov. 70; *Irvin v. Irvin*, 9 Wall. 627; *Drake's Lessees v. Ramsey*, 5 Ohio, 254; *Jackson v. Carpenter*, 11 Johns. 539; *Wallace v. Latham*, 52 Miss. 293; *Wilson v. Branch*, 77 Va. 65. Accepting this as the true exposition of the law on this subject, we come now to consider both the instruction which was given and those which were refused by the court.

[Omitting other points.]

By the third instruction the court was asked to charge the jury that if the plaintiff, after Martha A. Linton became of age, permitted the defendant to expend large sums of money in the improve-

Birch v. Linton.

ment of the land, without notifying him of their claim, they cannot recover.

By the fourth instruction the court was asked to instruct the jury that if they believed that Martha A. Linton had not disavowed the deed, but allowed the grantees therein and the defendants to hold possession of the land and to expend money and labor thereon, in permanent improvements, they should find for the defendant. The first of these two instructions, in effect, affirms the proposition that mere silence on the part of the infant, for a period short of the statutory limit, within which an action of ejectment may be brought, will bar the right of the infant to recover. Such however as we have before seen, is not the law; and this instruction therefore was properly refused. As to the fourth instruction, we have only to say, that it is not necessary in this State for the infant to do more than bring his suit within the proper time; that is all the disavowal of his deed that is required by the law here. See *Bedinger v. Wharton*, 27 Gratt. 870; *Mustard v. Wohlford's Heirs*, 15 id. 329.

Upon the merits we think that there is no reason for the complaint of the defendant that the infant stood by and saw improvements being put upon this property without giving any evidence of disavowal. On the contrary, the facts clearly establish that the infant, within two days after her conveyance was made, left the neighborhood and went to another State to reside, and has never been in that vicinity but once since, and then only for a brief period. And as to the alleged improvements, it is equally clear that they were only such as were incident to the cultivation of the land, the profits of which the defendant has enjoyed. Upon the whole, we are of opinion that the judgment appealed from is right, and must be affirmed.

Judgment affirmed.

MONTAGUE v. ALLAN'S EXECUTORS.

(78 Va. 502.)

Will—knowledge of contents—interested draftsman.

The testator's knowledge of the contents of the will may be shown by circumstances.

A will is not invalidated by the facts that it was drawn by a confidential friend of the testator and that his wife was a beneficiary.

ACTION to annul a will. The opinion states the case. The will was sustained below.

Joseph Christian and John Lyon, for appellants.

Jones, Kean & Nelson, for appellees.

FAUNTLEROY, J. On the 2d of April, 1881, Mrs. Louisa G. Allan, of Richmond, executed and acknowledged her last will and testament—a paper drawn by Mr. George W. Mayo, who was named as one of the executors, and whose wife was a large beneficiary. The testatrix died on the 24th of the same month. The will was admitted to probate by the Chancery Court for the city of Richmond April 27th, 1881, when George W. Mayo qualified as executor.

On September the 5th, 1882, Miss Genevieve Allen (who since the institution of the suit has intermarried with D. P. Montague) exhibited her bill in the said Chancery Court, in which, after reciting the probate of the paper aforesaid, and stating that she is one of the three heirs-at-law and distributees of Louisa G. Allan, deceased, she alleged that Mrs. Allan, when she signed and acknowledged the will or testamentary writing aforesaid, was insane; that she was not of sound mind; that she was mentally incompetent to make a lawful will, and that the paper in question was procured by George W. Mayo, who was the confidential agent and adviser of the testatrix, by the selfish exercise of undue influence over her mind, enfeebled by injuries, disease and age.

Mayo, his wife, and some other defendants answered the bill; the cause was matured; and the chancellor directed the trial of an issue, *devisavit vel non*, at the bar of the court. At the close of the evidence, of which a great deal, both oral and written, was

Montague v. Allan's Executors.

introduced before the jury, the plaintiffs in the issue (the appellees here) requested the court to give certain instructions, which the court did give, without objection or exception from the defendants in the issue (the appellants). Upon the trial of the issue the jury failed to agree upon a verdict; but upon a second trial, at a subsequent term of the said court, the jury found a verdict sustaining the said paper of April 2, 1881, in all its parts and provisions, as the true last will and testament of Louisa G. Allan, deceased. Upon the recordation of this verdict the defendants in the issue moved the court to set aside the verdict of the jury and to grant a new trial on the said issue; and the court took time to consider thereof.

On the 24th of February, 1883, the court overruled the said motion to set aside the said verdict of the jury, and to grant a new trial on the issue directed in the cause; and pronounced its decree in conformity with the said verdict of the jury, that the will of the testatrix, Louisa G. Allan, admitted to probate in the said court on the 27th day of April, 1881, is the true last will and testament of Louisa G. Allan, deceased; and the court dismissed the bill of the complainants with costs.

From this decree the appeal is taken, and this court is now to decide whether there is error in the proceedings of the court below as disclosed by the transcript of the record in the cause.

[Omitting minor matters.]

But the appellants contend that the decedent, "at the time of executing the said paper," did not know the contents of the said paper, and did not understand the disposition thereby made of her property; that she was subjected to the undue influence of George W. Mayo, who drew the will, who was present and procured its execution against her free will and purpose; that the jury in finding for the will disregarded the instructions of the court, and found a verdict plainly contrary to law, as expounded, and the facts as certified by the court.

The court which gave the instructions to the jury approved the verdict found, and refused to set it aside, as being neither contrary to the law nor the evidence which had gone to the jury. Judge CHRISTIAN, speaking for this court in *Blosser v. Harshbarger*, 21 Gratt. 216 (citing *Krugh v. Shanks*, 5 Leigh, 598), says: "In the Appellate Court there is superadded to the weight, which must always be given to the verdict of a jury, fairly rendered, that of the

Montague v. Allan's Executors.

opinion of the judge who presided at the trial, which is always entitled to peculiar respect upon the question of a new trial. The whole case was one peculiarly proper to be submitted to the jury, who are the proper judges of the weight of the evidence, and the verdict having been fairly rendered, and approved by the judge before whom the case was tried, it would be a violation of well-settled principles of law so often adjudicated by the courts, as well as an unwarranted abuse of the appellate powers of the court, to set aside the verdict and judgment, because the judges of this court might not concur with the verdict of the jury, upon the facts as they are certified here." Judge SCOTT, in *Grayson's* case, 6 Gratt. 712, said where "some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances or presumptions, a new trial will not be granted, merely because the court, if upon the jury, would have given a different verdict."

In *Patteson v. Ford*, 2 Gratt. 24, Judge BALDWIN said: "Much respect is due to the opinion of the jury, whose province is to weigh conflicting evidence, to scan the credit of witnesses, to estimate the force of circumstances, probabilities and presumptions, and to canvass intentions and motives. This is so evident, that the courts habitually defer to the conclusions of juries upon matters of fact, though opposed to their own; and hence the rule not to disturb a verdict, unless in case of plain deviation from the evidence."

It is contended by the appellants that beside the fact that the will was written by George W. Mayo, he produced it on the occasion of its execution, and Mrs. Allan signed and acknowledged it without reading or having it read to her.

It is true that the will was not read by or to Mrs. Allan when she signed it; but it does not therefore follow that she had not read it and was not fully aware of its contents and provisions. The jury must be satisfied that the testatrix knew the contents of the will at the time of signing and executing it, and they were in this case so explicitly instructed by the court; but the authorities are full and conclusive that they may be so satisfied, and that such knowledge may be proved by circumstantial evidence, and that direct evidence is not indispensably necessary. In the case of *Barry v. Butlin*, 1 Curtis, 6 Eng. Ecc. 417, PARK, B., said: "Nor can it be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for or reading over the

Montague v. Allan's Executors.

instrument. They form no doubt the most satisfactory, but they are not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased."

In *Crispell v. Dubois*, 4 Barb. 393, HARRIS, J., after stating that it would have been more satisfactory to have had evidence that the testatrix gave instruction for drawing the will, or that it was read by or to her, says: "But although such evidence would unquestionably have been the most satisfactory, I am not prepared to say that it was indispensable. I have been able to find no case in which this particular description of proof has been required. On the contrary, I understand the doctrine to be well settled that while it is necessary in such cases to prove that the will is the 'spontaneous intention' of the testator, such proof may be made out in any mode in which his real intentions can be ascertained."

In *Raworth v. Marriott*, 2 Eng. Ch. 644, Sir JOHN LEACH, M. R., held that the jury who tried the validity of the will must be satisfied that the testator knew of its contents, but their consideration need not be confined to direct evidence, and they may find for the will on circumstantial evidence only.

In *Donney v. Murphey*, 1 Dev. & Batt., 91-2, RUFFIN, C. J., says: "There are other circumstances equally satisfactory—such as the conformity of the will to previous or subsequent declarations, or to such dispositions as the party would be prompted by natural affection to make."

The appellants insist that Mayo's confidential relations to the testatrix, coupled with the fact that he wrote the will, and that his wife is the principal beneficiary, raise a conclusive presumption against the validity of the paper. Such circumstances certainly engender suspicion and arouse the vigilance of the court and jury, and if unexplained or repelled they would annul the transaction. There is a well-recognized distinction between the rule affecting testamentary gifts and gifts *inter vivos*; and it is now well settled by an unbroken current of authority—both English and American—that a will is not invalidated by the mere fact that it was written by the attorney, agent, physician, priest or other confidential adviser of the testator, who is himself a beneficiary. *Daniel v. Hill*, 52 Ala. 430; *Crispell v. Dubois*, *supra*; *Barry v. Butlin*, *supra*.

In the light of these authorities the facts appearing in this rec

Dun v. Seaboard and Roanoke Railroad Company.

ord afford satisfactory evidence that Mrs. Allan, the testatrix, knew the contents of the will when she executed it.

They show a testatrix of sound mind and strong will; they disclose testamentary dispositions in accord with her affections and with her repeated declarations; they prove that she marked her pictures preparatory, as she said, to disposing of them, and that her will refers to and disposes of them by means of marks; that she acknowledged the paper to be her will after its execution, and that it remained in her possession from the time of its execution to the day and event of her death. It is but just to George W. Mayo to add, that although the will was written by him, and his wife is the chief beneficiary under it, yet that wife was the child of the beloved and favorite sister of Mrs. Allan, lived in her home with her, and was unto her as a daughter; and that in fact she takes no greater benefit under the will established than she did under the olograph will of 1876.

We are of opinion that the paper executed by Mrs. Allan for her will April 2, 1881, and duly probated as such April 27, 1881, in the Chancery Court of Richmond city, is the true and last will of the testatrix aforesaid; that the verdict of the jury was right; that there is no error in the decree appealed from, and that the same must be affirmed.

Decree affirmed.

DUN V. SEABOARD AND ROANOKE RAILROAD COMPANY.

(78 Va. 645.)

Negligence — contributory — arm out of car window.

To ride with the arm outside the window of a railway car is fatal contributory negligence, unless it appears that the defendant knew the danger and omitted to warn the passenger *

ACTION for personal injury by negligence. The opinion states the facts. The defendant had judgment below.

Borland & Brooks, for plaintiff in error.

Holladay & Gayle, for defendant in error.

* See *Summers v. Crescent City R. Co.* (84 La. Ann. 189), 44 Am. Rep. 419.

Dun v. Seaboard and Roanoke Railroad Company.

LACY, J. The plaintiff in error was a passenger on the cars of the defendant company on the 14th August, 1880, and having his arm outside of the window of the car while the train was rapidly moving along the track, was struck upon his arm outside of the window by some cord wood ranked near the track of the road, and was seriously hurt. In March, 1881, suit was instituted by the said plaintiff in error against the said railroad company, claiming \$5,000 in damages for alleged carelessness and negligence in the said railroad company, in causing the said injury to be inflicted upon him, and set forth in his said declaration that his arm, when the injury was sustained, was resting outside of the window of the car a short distance — to-wit : about two inches — and alleging that the said cord wood had been negligently allowed to be stacked too close to the road.

To this declaration the defendant company demurred, and the demurrer was sustained by the court, whereupon the plaintiff in error applied for and obtained a writ of error to this court.

The assignments of error are, first, that the order of the 25th of October, 1881, was erroneous, because it withdrew from the consideration of the jury the question of negligence as a fact, and decided it as a matter of law ; and second, because the plaintiff's conduct, as admitted in the declaration, did not constitute such contributory negligence as to bar recovery ; that what constitutes negligence is a question of fact for the jury ; that the court could not pronounce that any given facts proved constituted negligence or want of due care on the part of the plaintiff in error, without encroaching on the rights of the jury, whose exclusive province it was to weigh the evidence and determine whether it was sufficient for that purpose ; "that this case was one especially proper to be submitted to a jury, for while there are extreme cases which hold the question of negligence to be at times a question of law for the courts, even they limit the doctrine to those cases where the standard of duty is fixed and certain, not variable, where the party has failed in the performance of some clear legal duty, where the necessary and inevitable inference from the undisputed facts is one of negligence." That in this case the duty of the plaintiff was to exercise ordinary care, such care as an ordinarily prudent man would, under the same circumstances, exercise ; and that ordinary care being the measure of duty, the question of negligence must of necessity be referred to the jury. That the plaintiff's conduct in

Dun v. Seaboard and Roanoke Railroad Company.

riding with his arm outside of the car window, as admitted in the declaration, does not constitute such contributory negligence as to bar recovery ; that the plaintiff's conduct, to bar recovery, must not only have been such as constitutes negligence, but negligence so contributing to the accident that it would not have been avoided by the exercise of due care and prudence on the part of the defendant at the time of the occurrence.

The defendant in error, on the other hand, insists that the plaintiff in error was guilty of contributory negligence, which was the proximate cause of the injury sustained by him, and that a person who is injured by the mere negligence of another cannot recover at law or in equity any compensation for his injury if he by his own or his agent's negligence, or willful wrong, proximately contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him, except when the mere approximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the other party is exposed, to use a proper degree of care to avoid injuring him.

The declaration in this case having set forth the fact that the plaintiff had his arm outside of the car window when it was struck in passing the wood rank, the defendant, by his demurrer, admitted all the facts charged in the declaration to be true, not only as to the alleged fact that the plaintiff's arm was out of the window, but also that the cord wood was negligently piled too near the passing trains to permit of a passenger's arm being placed outside of the car window even so far, and thus raised before the court the question whether the plaintiff could recover in an action against a defendant for alleged negligence, if the plaintiff had on his part been guilty of contributory negligence, which was the immediate and proximate cause of the injury.

If the case the plaintiff has made in the declaration in this case is one for which, under the rules of law applicable to the questions involved, there could be no recovery, then the demurrer was properly sustained ; while on the other hand, if under the said rules of law the plaintiff was entitled to some recovery, the demurrer should have been overruled and the case submitted to the jury upon the facts, with proper instructions from the court upon the law of the case.

The sole question for this court to decide in this case is, whether

Dun v. Seaboard and Roanoke Railroad Company.

a person who is injured by the negligence of another, not willful or intentional, can recover in an action therefor when he by his own negligence proximately contributed to the injury, so that but for his co-operating fault the injury would not have happened, except when the direct cause of the injury is the omission of the other party. after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence.

[Omitting minor considerations.]

In the case we are considering, the facts are stated by the plaintiff in his declaration upon which he claims a recovery. These facts on the other hand, are admitted by the defendant; and the question is submitted to the judge of the court below, as a question of law, whether, upon the facts there stated, which are all agreed. and none of which were controverted, the plaintiff is entitled to any recovery? It is nowhere alleged in the declaration that the contributory negligence of the plaintiff was known to the defendant, and that the defendant, seeing the danger in which he had placed himself, did not exercise the required diligence on his part to prevent the injury, by warning the plaintiff of the threatened danger. The court, as we have said, held that the negligence of the plaintiff was the immediate cause of the injury which he suffered. and that without such negligence on his part the injury to him would not have happened.

The question thus raised as to the negligence of a passenger in a railway carriage, thus committed by riding with a part of his body outside of the carriage, has often been the subject of judicial investigation in the courts of other States.

In the case of *Laing v. Calder*, 8 Penn. St. 479, the arm of a passenger was broken whilst he was travelling on a railroad car. The accident occurred while the car was passing over a bridge which was so narrow that the plaintiff's hand, lying outside of the carriage window, was caught by the bridge and the arm was broken. In this case the court held that the merely suffering the hand to remain outside the window was not necessarily negligence which would bar a recovery. But in a subsequent case, in the same court, of the *Pittsburg R. v. McCleery*, 56 Penn. St. 294, where an injury had been sustained by a passenger from a similar cause, it was held that the thoughtless or imprudent protrusion of the elbow from the window of the car, was negligence *in se*, which would exempt the

Dun v. Seaboard and Roanoke Railroad Company.

company from all liability, although the hurt was produced by the passenger's arm coming in contact with a car standing on a switch on defendant's road. A passenger (said THOMPSON, C. J.) is to be presumed to know the use of a seat, and the use of a window; that the former is to sit in and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy, but not to occupy. Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest to it. If therefore he sit with his elbow in it, he does so without authority; and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier nor invited to go there, nor misled as to the fact that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is therefore without authority. His negligence consists in putting his limbs where they ought not be, and where they are liable to be broken without his ability to know whether there is danger or not approaching. In a case therefore where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court.

And in the case of *Todd v. Railroad*, 3 Allen, 18; 7 id. 207, where an action was against a railroad company to recover damages for a personal injury to the elbow of a passenger extended through an open window, it was held that there was no liability upon the company. In that case the court said: "Looking at the mode in which railroads are constructed, with posts and barriers, which are placed very near to the track on which the cars are to pass, the rapid rate at which trains move, the manner in which the cars are made, with seats to accommodate passengers so as to avoid any exposure of the body or limbs to outward objects in passing, we can see no ground on which it can be contended that a person travelling on a railroad is exercising reasonable care in placing his arm in such a position that it protrudes from a window, and may come in contact with external obstructions." It was therefore held, that if a passenger's elbow extended through the open window beyond the place where the sash would have been if the window had been shut, it was the duty of the court to rule that it was such carelessness as to

Dun v. Seaboard and Roanoke Railroad Company.

prevent a recovery of damages by him. And the rule thus laid down has been followed in many subsequent cases. *Louisville R. v. Stickings*, 5 Bush, 1; *Indianapolis R. v. Rutherford*, 29 Ind. 82; *Pittsburgh R. v. McCleery*, *supra*; *Pittsburgh R. v. Andrews*, 39 Md. 329; s. c., 17 Am. Rep. 568; *Holbrook v. Railroad*, 12 N. Y. 236.

According to these decisions, the protrusion of the limbs of the passengers, even to the minutest distance out of the windows of the car, will be regarded as necessarily and under all circumstances such contributory negligence on the part of the passenger as will deprive him of all right to claim compensation from the carrier for injuries which may be occasioned thereby, however incautious the latter may have been in guarding against such accidents.

A different rule has been laid down in other cases in other States of the Union, and in some of them the courts have gone so far as to hold that the carrier is responsible for such injuries received under such circumstances, unless the windows of the cars are so barricaded with bars as to render it impossible for the passenger to put any of his limbs outside of the window. *New Jersey Railroad v. Kennard*, 21 Penn. St. 203; *Spencer v. Railroad*, 17 Wis. 487; *Chicago R. v. Pondrom*, 51 Ill. 333; s. c. 2 Am. Rep. 306.

But we are constrained to withhold our sanction from these cases. It seems to be the better rule, both upon authority and upon reason, that the passenger, being endowed with intelligence which enables him to foresee and to avoid danger, the exercise of at least ordinary prudence is required on his part to escape it; and if by his failure to exercise these faculties for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention, and the responsibility will not be thrown on the carrier. The carrier is held to the utmost care and circumspection which can be exercised under all the circumstances, so far as human care and foresight can go. It ought not to be held necessary, and can be so held upon no sound principle, that the carrier should barricade and bar the windows, to the partial exclusion of light and air, and to the discomfort, and, in case of collision or other accident of like kind, at a sacrifice of the safety of all. It many times happens, when trains have collided and the cars telescoped, the doors are jammed up so as to be useless; fire is often the immediate result, and the open windows on such cars furnish the only means of escape from a hor-

Clark's Administrator v. Richmond and Danville Railroad Company.

rible death. To bar the windows would increase the danger as well as the discomfort of railroad travel. And the same reason which commend the bars on the windows would as well require the doors to be locked and barred; and then all these precautions would prove unavailing where the passengers sought to avoid the restraints thus imposed. We do not think such restraints and precautions ought to be held necessary in order to prevent intelligent and rational beings from thrusting their heads or their limbs through the windows of swiftly moving trains.

It is better, we think, to adhere to the rule already established in this court cited above, that "one who if injured by the mere negligence of another cannot recover any compensation for his injury if he, by his own ordinary negligence or willful wrong, contributed to produce the injury of which he complains; so that but for his concurring and co-operating fault the injury would not have happened to him, except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." *Tuff. v. Warman*, 5 Q. B. (N. S.) 573; *R. Co. v. Anderson*, 31 Gratt. 812; s. c., 31 Am. Rep. 750.

And we are therefore of opinion that there is no error in the judgment of the corporation court of the city of Portsmouth appealed from, and the same must therefore be affirmed.

Judgment affirmed.

CLARK'S ADMINISTRATOR V. RICHMOND AND DANVILLE RAILROAD COMPANY.

(78 Va. 700.)

Negligence — contributory — riding on top of car — low bridge.

A railway brakeman was killed by collision with a low bridge while standing on top of a freight car in the night. He had been warned of the bridges, and had several times passed this bridge by daylight. *Held*, that there could be no recovery.*

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The defendant had judgment below.

*See *Pittsburgh and Connellsville R. Co. v. Sentmeyer* (92 Penn. St. 276), 87 Am. Rep. 684; *Wells v. B. O. & N. R. Co.*, 56 Iowa, 590.

Clark's Administrator v. Richmond and Danville Railroad Company.

Flournoy & Martin, Carrington & Fitzhugh, for plaintiff in error.

H. H. Marshall, for defendant in error.

LACY, J. The deceased, James H. Clark, was a brakeman upon a freight train of the defendant company. He lost his life on the 21st of February, 1880, while in discharge of his duties as brakeman, and his administrator, the plaintiff in error, brought this suit to recover of defendant in error damages, on the ground that his death was due to the negligence of the defendant in error.

The defendant demurred to the evidence, and the court compelled the plaintiff to join therein. The jury assessed the damages of the plaintiff, if judgment should be for him, at \$7,500. The court sustained the demurrer, and gave judgment for the defendant thereon. Thereupon the plaintiff applied for a writ of error and *supersedeas* to this court, which was awarded May 18, 1882.

The plaintiff's intestate's duty as a brakeman on a freight train required him to be on the top of the moving train. In his service upon the said freight train, while running from Greensboro to Richmond, he was struck by a highway bridge which spans a cut on the said railroad line, in the suburbs of the city of Danville, and killed by the collision. In coming to Danville the train runs down grade, which begins about a mile before reaching the said highway bridge. It was impossible for a man of ordinary stature to stand erect on the freight cars and pass with safety under said bridge, and such is the case with most of the overhead structures on the line of this road.

It is insisted that the defendant company was guilty of negligence in constructing its overhead bridges so low as to require a brakeman who is doing duty to stoop in order to pass under the same with safety; and that it was negligence in the said company not to have any ascertained and established system of bridge signals to give notice of the approach to these bridges, and not to have any guards across the track to warn its employees of the approaching danger; and that in this case there was no sufficient warning given this brakeman, who was a new hand, and under twenty-one years of age, of the approach to this particular bridge, which was passed in the night-time.

Clark's Administrator v. Richmond and Danville Railroad Company.

The evidence shows that the said employee was of the usual size and stature of full-grown men, being six feet high, and weighing 180 pounds, and having the appearance of a full-grown man; and the fact that he was under age was unknown to the company, or any of its agents; that the said employee had been employed by the said company some two years before without objection on the part of his father, who suffered his son to collect his own pay from the company, and pay it to him; that for some time before he sought and obtained employment as brakeman he had been employed in the company's yard in Manchester, shifting cars, making up trains and the like. The evidence shows that at the time when his service was engaged by the company's agent, the said employee was warned to look out for the overhead bridges, and his fellow brakemen were instructed to show him the bridges, and to warn him of the dangers attending the same. The said employee had been under this highway bridge three times, and in the day-time, and was killed in going under the same in the night-time, but that it was not a dark, but a moonlight night; that on leaving the station west of Danville his fellow brakeman had said to him, "Now we are going down to Danville, look out for the bridge;" and the bridge in question was the only bridge in going from there down to Danville. When nearing the bridge, his fellow brakeman seeing he was standing, endeavored to warn him of the danger, and shouted to him to stoop, but he remained standing as if not hearing or noticing, and was struck and killed by the bridge.

[Question of practice omitted.]

When we consider this evidence in the light of the authorities cited, and the established principles which govern in the case of a demurrer to evidence, we must determine first whether the defendant was guilty of such negligence as was the immediate cause of injury received by deceased, and whether there was contributory negligence on the part of the deceased; whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary or common care and caution, that but for such negligence or want of ordinary care or caution on his part, the misfortune would not have happened.

In the first case the plaintiff would be entitled to recover. In the latter, not; as but for his own fault the misfortune would not

Clark's Administrator v. Richmond and Danville Railroad Company.

have happened. Mere negligence or want of ordinary care or caution would not however disentitle him to recover unless it were such that but for that negligence or want of ordinary care and caution the misfortune could not have happened, nor if the defendant might by exercise of care on his part have avoided the consequence of the neglect or carelessness of the plaintiff. The negligence charged against the defendant company is, as we have seen, that the overhead bridges are constructed so low as not to allow a person to stand erect upon the top of freight cars passing thereunder; and in the second place not sufficiently warning the deceased of the threatened danger.

In the case of *Devitt v. Pacific Railroad*, 50 Mo. 302, questions similar to these raised by this record were considered and decided by the court. The plaintiff's son was a minor, and was killed riding on the top of a freight car passing under a bridge. The accident occurred in the day-time, and the deceased had been in the employ of the company about three weeks, had frequently passed under the bridge, and had been repeatedly warned to look out for this and other bridges; and when last seen he was sitting upon the brake facing the bridge. The court in that case held that "it would be difficult to imagine a clearer case of contributory negligence, and if one guilty of it could recover, or his friends for him, if the experiment proved fatal, we must necessarily ignore the legal consequences of such negligence. * * * An employee or servant cannot recover for injuries received from the negligence of other servants when the principal is not at fault. But if the principal has been guilty of fault or negligence either in providing suitable machinery, or in the employment or selection of suitable agents or servants, and injury arise in consequence, he must respond in damages. This liability is however modified, when the servant himself, well knowing the default of his principal, as in providing defective or unsuitable machinery, voluntarily enters upon the employment. * * * By so doing he assumes the risk, and hence cannot charge it to his employer. If persons are induced to engage, in ignorance of such neglect, and are injured in consequence, they should be entitled to compensation; but if advised of it, they assume the risk. They contract with reference to things as they are known to be, and no contract is violated, and no wrong is done if they suffer from a neglect whose risk they assumed." Citing *Wright v. N. Y. C. R. Co.*, 25 N. Y. 566; *Brazzell v. La-*

Clark's Administrator v. Richmond and Danville Railroad Company.

Conia M. Co., 48 Me. 113; *Thayer v. St. L. and T. H. R.*, 22 Ind. 26; *Hayden v. Smithville M. Co.*, 29 Conn. 548; *Mud River and L. E. R. v. Barber*, 5 Ohio, 541.

In the case of *Owen v. New York Central Railroad Company*, 1 Lans. 108, a brakeman, in the employ of a railroad company, while discharging duties in the line of his employment, upon the roof of a freight car, was carried against a highway bridge and sustained injuries, for which he brought an action against his employer. The bridge was some three and a half feet higher than the top of the highest freight car in use by the company. The brakeman had entered into the employment of the company with knowledge of the position and height of the bridge, and he had had opportunity of informing himself as to its continuance in the same position. It was held that "the plaintiff should have been non-suited, the danger from the bridge being clearly incident to the labor he undertook to perform. In view of the brakeman's knowledge as to the bridge, his omission to avoid the accident by stooping was such want of ordinary care and caution as would have defeated his action if otherwise maintainable. Having assumed the risk of injury to his person from the bridge, evidence offered by him upon the trial tending to show its dangerous character was properly excluded. The danger was open and obvious, and within the plaintiff's personal knowledge at the time he entered the defendant's employment. It was a danger clearly incident to the service which he undertook to perform. He knew as well as his employer the perils of the business, at least as respects the bridge in question, and the law will imply that he assumed the risk of personal injury," citing *Sherman v. Rochester and Syracuse R. Co.*, 17 N. Y. 153; *Faulkner v. Erie R. Co.*, 49 Barb. 324; 39 N. Y. 468.

"This is a well-settled rule; but if the rule were otherwise, upon the evidence in this case the plaintiff was not entitled to recover upon another ground. The injury was caused by his own negligence. It is admitted that he knew that this was a low bridge, and he must have known that he could not pass under it while on the top of the cars, unless he stooped, without injury. He might have avoided all injury by the exercise of the most ordinary care and caution. The exception taken to the ruling of the court, excluding the evidence offered by the plaintiff, that other persons had been killed at the same crossing, must be overruled. That evi-

Clark's Administrator v. Richmond and Danville Railroad Company.

dence was wholly immaterial if the plaintiff took upon himself the risk of injury to his person from that structure, as he undoubtedly did."

In the case of *Baltimore and Ohio Railroad Co. v. Stricker*, 51 Md. 47; s. c., 34 Am. Rep. 294, the court said upon this question: "This suit was brought by the appellee to recover for injuries received by being carried against a bridge spanning the appellant's road while he was on the top of a 'house car' in the discharge of his duty as a conductor of a freight train. * * * To entitle the plaintiff to maintain this suit, it was necessary to prove that the company had been guilty of negligence which directly caused the injury; that is to say, that in the relation which existed between the appellee and the company, the latter had failed or neglected to perform some duty toward the appellee which was devolved upon it by law; and secondly, it must appear that the appellee was not guilty of any negligence on his part, or any want of reasonable prudence and caution to avoid the accident. 1st. As to the alleged negligence on the part of the company. In what did this consist? It was said it was negligent in constructing the bridge so low that a conductor or brakeman could not pass under it in safety on the top of a house car where his duty required him sometimes to be. But there is no evidence to support this position. On the contrary, all the proof shows that the employees of the company, and the appellee among them, every day passed under the bridge in safety by observing the simple and easy precaution of stooping or sitting down while passing under the bridge.

"No negligence can be imputed to the company because the struts of the bridge were not high enough to allow a person to pass under them standing upright on top of the cars. *Baylor v. Del. and W. R. Co.*, 11 Vroom, 23; s. c., 29 Am. Rep. 208. It was not required of the appellee to stand upon his feet while passing the bridge.

"Nothing is better settled than that the implied contract between the employer and the employee is that the latter takes upon himself all the natural risks and perils incident to the service." *Moran's case*, 44 Md. 292.

"When a servant enters upon an employment, he accepts the service subject to the risks incidental to it. An employee who contracts for the performance of hazardous duties, assumes such risks as are incident to their discharge from causes open and obvious, the

Clark's Administrator v. Richmond and Danville Railroad Company.

dangerous character of which causes he had opportunity to ascertain.

“If a man chooses to accept employment, or continue in it, with the knowledge of the danger, he must abide the consequences so far as any claim against the employer is concerned.” *Woodley v. M. D. Co.*, 2 Ex. Div. 389; 21 Moak Eng. 507.

What then was the legal duty of this company? It was the duty of the company to exercise all reasonable care, to provide and maintain safe, sound and suitable machinery, roadway structures and instrumentalities; and it must not expose its employees to risks beyond those which are incident to the employment, and were in contemplation at the time of the contract of service; and the employee has a right to presume that the company has discharged these duties. *O'Connell's case*, 20 Md. 212; *Scully's case*, 27 id. 589; *Winder's case*, 32 id. 419.

In the case in hand the deceased, after service in the company's depot grounds for some time, engaged about shifting cars, coupling cars, and such like duties, sought employment as brakeman. As this service was performed in the town of Manchester, on the banks of the James river, which is spanned by one of the bridges of this railroad company, and close to the same, it might be presumed, perhaps, that he knew of the character of the duties of a brakeman performed before his eyes every day. But in this case it is clearly proved that he was instructed by his employer at the time of the contract of service as to the dangerous character of the service required of a brakeman, and especially as to the danger in passing under these overhead structures without sitting down or stooping, and that he was notified in particular about this particular bridge; and that it was shown to him, and that he passed under it in the broad daylight, which he could not have done without stooping; that after passing under this bridge three times, he was specially warned about it again as he was about to pass under it on the fatal night; that he did not exercise the precaution required of stooping, and that he was standing up when he was struck. Why he did not stoop or sit down will never be known, as he was killed by the collision. Whether he forgot to stoop, as he had before done in passing under this bridge, is not known, but his negligence in not exercising this simple and ordinary care and caution was the proximate cause of his death, without which it would not have occurred, and the appellant cannot recover damages therefor of the

Moon's Administrator v. Richmond and Alleghany Railroad Company.

company. While we think the accident was caused by want of reasonable care on the part of the appellant's intestate, we do not rest our decision solely on this ground. This peril was one incident to the employment, in contemplation at the time of the contract, and arising from causes open and obvious, the dangerous character of which the deceased had an opportunity to ascertain, and the risk of which he assumed.

Having stated our opinion upon the rules of law applicable to the case, which deny to the appellant the right to recover, it is not necessary to more specially notice the several assignments of error contained in the record. We are of opinion that there is no error in the judgment complained of and appealed from in this case, and the same must be affirmed.

Judgment affirmed.

FAUNTLEROY, J., dissented.

MOON'S ADMINISTRATOR v. RICHMOND AND ALLEGHANY RAILROAD COMPANY.

(78 Va. 745.)

Master and servant — co-servants — conductor, section foreman and trainmen.

The conductor of a railway material train is not a fellow-servant of the trainmen ; nor is a section foreman. (*See note, p. 406.*)

ACTION for death of plaintiff's intestate by negligence. The opinion states the case.

R. T. Hubbard, for appellant.

Johnston, Williams & Boulware and *Carrington & Fitzhugh*, for appellee.

FAUNTLEROY, J. This is a writ of error to a judgment of the Circuit Court of the city of Richmond, rendered on the 21st December, 1881, in a suit in which E. B. Spencer, administrator of George Moon, deceased, is plaintiff, and the Richmond and Alleghany Railroad Company is defendant.

The action is for recovery of damages from the defendant company of \$10,000 for the killing of the plaintiff's intestate, George

Moon's Administrator v. Richmond and Alleghany Railroad Company.

Moon, by the negligence of the said company, and through no contributory negligence of the said decedent, who was an employee of the said company, and who, as such, was faithfully performing his duty at the time of the accident which caused his death.

On Monday morning, July 25, 1881, a material train, which on Saturday next before had been run up to Joshua Falls, was started down the road, running backwards, with the engine and tender not turned around, but simply detached from the front of the train and coupled at the rear, the pilot of the engine being attached to the rear car, which was the captain's caboose car.

George Moon was one of a party of colored men who had been engaged for this company, in Halifax county, by Captain W. R. Thompson, the conductor on this train, and Moon had been put under his charge and orders, and received orders only through him. Moon was an experienced, able-bodied railroad hand, in the twenty-third year of his age, and number one in all respects, and was made one of the rear brakemen by the conductor. This train was in use hauling cross-ties from points of delivery between the Falls of Joshua and Scottsville, and also in hauling dirt for repairing the track from time to time. Various parties of section hands were at work upon the road on the 25th of July, and all signalled the train with flags as it approached them, save one. This party, under the section-master, Herndon, was at work a few miles below Gladstone station, upon a curve in the road, and had the outside rails up, bringing them to a higher level than had existed before, and had what is called a "run out," with one end corresponding in level with the new and raised level above, while the other end had the same level as the old track below. Under this "run out" the dirt had not been filled in and rammed firm, but it had only been tamped — that is, gravel had been thrown under the end of the tie on which the joints of the rail rested at the upper end of the "run out," and also under the ties at other places along the "run out." With the track in this condition, on a curve, the foreman, or section-master, Herndon, deliberately chose to take the chances, and gave no signal to the approaching train. The engineer running the train, who had been experienced as an engineer for thirty years, saw the hands of this working party under the section-master, Herndon, at work on the track half a mile ahead, but seeing no flag signal, thought all was right and put on steam, and when he thought he had passed all the hands standing near the track, "gave

Moon's Administrator v. Richmond and Alleghany Railroad Company.

her steam again to quicken up, and just after saw the tender jumping and knew it was off the track." He shut off the steam and was, with his engine, carried over the banks, etc. The cars were new, the rails and ties were new, and there was no obstruction on the track; yet the tender was thrown off and jerked clear around and upset over the embankment, the engine thrown off and turned over into the canal; one caboose car jumped clear over the engine, and another was broken to pieces, and two flats likewise, while a third flat was reared up upon the wreck with its hind wheels resting on the track; George Moon was thrown off to the right, and caught under the wreck and had all the flesh torn off of one leg from the knee to the foot, and his body so bruised and injured that he died after eight hours of intense suffering. The record shows that the deceased, George Moon, was faithfully performing his duty — was guilty of no negligence — and that there was no apparent or imaginable cause for the accident, other than the running of the train over the newly raised and unequally elevated track around a curve, and accelerating the speed just at the place where the track had been disrupted by the working party, then on the spot, who wholly failed to signal or notify the oncoming train, under an old and experienced engineer, who says that he saw the party full half a mile ahead, but seeing no flag, therefore concluded that all was right.

Upon this state of facts the plaintiff's attorney moved the court to instruct the jury as follows, viz.: I. "If the jury believe from the evidence in this case that Conductor W. R. Thompson had general charge and control of the train men, assigning them to such duties as he thought proper, and general control over the coupling and make-up of his train, and that the accident of July 25, 1881, was caused by any negligence in the management of making up his train, the company is liable therefor, and they must find for the plaintiff."

We think that this instruction should have been given as asked; and the court erred in refusing to give it. It was certainly incumbent on the defendant company, upon the facts shown by record, to show, affirmatively and positively, that the accident was not caused by its negligence, or the negligence of any agent for whose conduct the company itself was responsible (*Greenleaf v. Illinois Central Railroad Co.*, 29 Iowa, 14); and the evidence showing by the defendant's own witnesses that the train was not made up in the usual and proper way, and that W. R. Thompson, the conduc-

Moon's Administrator v. Richmond and Alleghany Railroad Company.

tor, was not a fellow-servant of Moon, but his superior, and in a position wherein he exercised discretionary authority, and was charged with certain duties, for the proper performance of which the law holds the company itself responsible, any negligence on his part in this behalf is the negligence of the company itself. *Railroad Company v. Fort*, 17 Wall. 553; *Brothers v. Cortter*, 52 Mo. 373; s. c., 14 Am. Rep. 424; *Patterson v. Pittsburg and Connells-ville Railroad*. 76 Penn. 389; s. c., 18 Am. Rep. 412.

And we think the second instruction: "If the jury shall believe from the evidence that the accident was caused by any negligence or want of skill on the part of Herndon, the section foreman, in failing to signal the train, or in failing to have the track in safe condition at the place of the accident, the company is liable, and they must find for the plaintiff," was correct, and ought to have been given by the court. Herndon, the section master, in charge of a squad of hands working, altering and repairing the road, could in no sense be regarded a fellow-servant in the same common employment, or department of service with Moon, who was a train-hand and brakeman. *Connolly v. Davidson*, 15 Minn. 519; s. c., 2 Am. Rep. 154. They were not co-employees, thrown together in a common duty, and having opportunity to observe and judge of the habits and qualifications of each other. *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; s. c., 21 Am. Rep. 385; *Ryan v. Chicago and N. W. R. Co.*, 60 Ill. 171; s. c., 14 Am. Rep. 32. And where a company delegates to an agent or employee the performance of duties which the law makes it incumbent on the company to perform, his acts are the acts of the company — his negligence is the negligence of the company. *Brothers v. Cortter*, 52 Mo. 373; s. c., 14 Am. Rep. 424; *Flike v. Boston and Albany R. Co.*, 53 N. Y. 549; s. c., 13 Am. Rep. 545; *Corcoran v. Holbrook*, 59 N. Y. 517; s. c., 17 Am. Rep. 369; *Mullan v. Philadelphia and Southern S. Co.*, 78 Penn. 25; s. c., 21 Am. Rep. 2; *Ryan v. Chicago and N. W. R. Co.*, 60 Ill. 171; s. c., 14 Am. Rep. 32. If corporations could, in such cases, escape liability on the plea that their agent was fellow-servant or co-employee of the party injured, it follows that they could never be held liable at all, since such corporations must need perform their duties always through agents, who have a common employer. *Flike v. Boston and Albany R. Co.*, 53 N. Y. 549, *supra*; *Hough v. R. Co.*, 100 U. S. 218-19; Whart. Neg., § 233.

The fellow-servant or co-employee, for whose negligence the com-

Moon's Administrator v. Richmond and Alleghany Railroad Company.

pany is not liable, is one who is in the same common employment — that is, in the same shop, or placed with, and having no authority over, the one injured — and who is no more charged with the discretionary exercise of powers and duties imperatively resting on the company than the injured party ; but where a person is placed in charge of the “construction or repair of machinery,” the “dispatching of trains,” the “maintenance of way,” etc., he is not a fellow-servant with those under him, nor with those in a different department of the company's service. He is the agent of the company, which has assumed, through him, the performance of duties which are absolute and imperative ; the omission or the negligence of performing which the law will in nowise excuse. *Clarke v. Holmes*, 7 Hurl. & Nor. 937 ; *Ford v. Fitchburg R. Co.*, 110 Mass. 241 ; s. c., 14 Am. Rep. 598 ; *Hough v. Railroad Co.*, *supra*.

The third instruction asked for by the plaintiff, covering the case of the accident being caused by the insecure condition of the track below where Herndon was at work, and the fourth instruction, whether it was at or below his work, were proper and relative to the facts in evidence, and should have been given by the court.

The court declined to give the instructions asked for, and in lieu thereof, gave three instructions of its own as follows, viz. :

First. “The jury are instructed that they should find for the defendant in this cause, unless they believe from the evidence that the death of the plaintiff's intestate was caused by some wrongful act, neglect or default of the defendant corporation.”

This instruction is correct as a proposition of law, but following the refusal of the court to give the instructions which had been asked by the counsel for the plaintiff, it should have concluded with the addition of “or its agents.”

The second instruction given by the court was : “And the jury are further instructed, that if they believe the accident which caused his death was occasioned by any negligence of Herndon, the section foreman, in failing to signal the train, they cannot impute such negligence in this case to the defendant, and should find for the defendant.” This instruction is erroneous, and is against law and reason alike. It assumes that an employee “takes all risks,” when in law his contract is based on the implied duty and undertaking of the company to provide safe and adequate machinery, competent and vigilant agents, and to keep its roadway and structures always in good and safe condition, when he is required to go

Moon's Administrator v. Richmond and Alleghany Railroad Company.

over them. *Chicago and N. W. R. Co. v. Jackson*, 55 Ill. 492; s. c., 8 Am. Rep. 661; *Corcoran v. Holbrook*, 59 N. Y. 517; s. c., 17 Am. Rep. 369; *Baxter v. Roberts*, 44 Cal. 187; s. c., 13 Am. Rep. 160; *Snow v. Housatonic Railroad Co.*, 8 Allen, 441; *Lewis' Adm'r v. St. Louis and Iron Mountain R.*, 59 Mo. 495; s. c., 21 Am. Rep. 385; *Patteson v. Pittsburg and Connellville Railroad*, 76 Penn. St. 389; s. c., 18 Am. Rep. 412; *Drymala v. Thompson*, 26 Minn. 40; *Moore's Adm'r v. R. and D. Railroad*, 8 Va. L. J. 84.

[Minor matter omitted.]

The court erred in overruling the motion for a new trial. Under the instructions given, and the refusal to give the instructions asked by the plaintiff, the jury could not find otherwise than they did; but the verdict was against both law and evidence, and should have been set aside. The evidence shows that the deceased, George Moon, came to his death while faithfully performing his duty in the service of the Richmond and Alleghany Railroad Company without any contributory negligence on his part, but wholly and solely by the breach of duty and negligence of the said company, which was reckless of decedent's life, in requiring him, without warning, to go at a rapid speed over a part of its roadway which was at the time, and in the knowledge of its agents, unfit and unsafe to be run over by the train.

The judgment of the Circuit Court of the city of Richmond in this case must be reversed and annulled, and the case remanded for a new trial in said court, in accordance with the views herein expressed.

Judgment reversed.

HINTON, J., concurred in result.

NOTE BY THE REPORTER.—In *Railroad v. Ross*, 112 U. S. 877, it was held that a railway company is liable to a locomotive engineer injured by the negligence of a conductor in the conduct of a train. The following are the material portions of the opinion, by FIELD, J.:

“The general liability of a railroad company for injuries caused by the negligence of its servants to passengers and others not in its service is conceded. It covers all injuries to which they do not contribute. But where injuries befall a servant in its employ, a different principle applies. Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or in law is supposed to have them in contemplation when he engages in the service, and that his compensation is

Moon's Administrator v. Richmond and Alleghany Railroad Company.

arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid. There is also another reason often assigned for this exemption, that of a supposed public policy. It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to danger of life or limb, because if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant.

“ But however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence.

“ When the service to be rendered requires for its performance the employment of several persons, as in the movement of railway trains, there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such cases that he takes upon himself the risks arising from the negligence of his fellow-servants, while in the same employment, provided always the master is not negligent in their selection or retention, or in furnishing adequate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable. The doctrine was first announced in this country by the Supreme Court of South Carolina in 1841, in *Murray v. Railroad Co.*, 1 McMullan, 385, and was affirmed by the Supreme Court of Massachusetts the following year in *Farwell v. Boston and Worcester R. Co.*, 4 Metc. 49. In the South Carolina case a fireman, whilst in the employ of the company, was injured by the negligence of an engineer also in its employ, and it was held that the company was not liable, the court observing that the engineer no more represented the company than the fireman; that each in his separate department represented his principal; that the regular movement of the train of cars to its destination was the result of the ordinary performance by each of his several duties; and that it seemed to be on the part of the several agents a joint undertaking where each one stipulated for the performance of his several part; that they were not liable to the company for the conduct of each other, nor was the company liable to one for the conduct of another and that as a general rule, when there was no fault in the owner, he was only liable to his servants for wages.

Moon's Administrator v. Richmond and Alleghany Railroad Company.

"In the Massachusetts case, an engineer employed by a railroad company to run a train on its road was injured by the negligence of a switch-tender also in its employ, and it was held that the company was not liable. The court placed the exemption of the company, not on the ground of the South Carolina decision, that there was a joint undertaking by the fellow servants, but on the ground that the contract of the engineer implied that he would take upon himself the risks attending its performance, that those included the injuries which might befall him from the negligence of fellow servants in the same employment, and that the switch-tender stood in that relation to him. And the court added, that the exemption of the master was supported by considerations of policy. 'When several persons,' it said, 'are employed in the conduct of one common enterprise or undertaking, and the safety of each depends on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other.' And to the argument, which was strongly pressed, that though the rule might apply where two or more servants are employed in the same department of duty, where each one can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty at a distance from each other, and where one can in no degree control or influence the conduct of another, it answered that the objection was founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. 'When the object to be accomplished,' it said, 'is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case.' And it added, 'that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied.' 4 Metc. 49, 60.

"The opinion in this case, which was delivered by Chief Justice SHAW, has exerted great influence in controlling the course of decisions in this country. In several States it has been followed, and the English courts have cited it with marked commendation.

"The doctrine of the master's exemption from liability was first distinctly

Moon's Administrator v. Richmond and Alleghany Railroad Company.

announced in England in 1850 by the Court of Exchequer in *Hutchinson v. York, New Castle and Berwick R. Co.*, 5 Exch. 343; *Priestly v. Fowler*, 3 Mees. & Wels. 1, which was decided in 1837, and is often cited as the first case declaring the doctrine, did not directly involve the question as to the liability of a master to a servant for the negligence of a fellow-servant. In that case a van of the defendant in which the plaintiff was carried was out of repair and overloaded, and consequently broke down and caused the injury complained of; but it did not appear what produced the defect in the van or by whom it was overloaded. The court in giving its decision against the plaintiff observed that if the master was liable, the principle of that liability would 'carry us to an alarming extent;' and in illustration of this statement said that if the owner of a carriage was responsible for its sufficiency to his servant, he was under the principle responsible for the negligence of his coach-maker or harness-maker or coachman, and mentioned other instances of such possible responsibility to a servant for the negligence of his fellows, concluding that the inconvenience of such consequences afforded a sufficient argument against the application of the principle to that case. The case therefore can only be considered as indirectly asserting the doctrine. At any rate, the *Hutchinson* case is the first one where the doctrine was applied to railway service. There it appeared that a servant of the company, who in the discharge of his duty was riding on one of its trains, was injured by a collision with another train of the same company, from which his death ensued; and it was held that his representatives could not recover as he was a fellow-servant with those who caused the injury; and the court said that whether the death resulted from the mismanagement of the one train or the other, or of both, did not affect the principle. The rule was applied at the same time by that court to exempt a master builder from liability for the death of a bricklayer in his employ caused by the defective construction of a scaffolding by his other workmen, by reason of which it broke and the bricklayer at work upon it was thrown to the ground and killed. *Wigmore v. Jay*, 5 Exch. 854.

The doctrine assumes that the servant causing the injury is in the same employment with the servant injured, that is, that both are engaged in a common employment. The question in all cases therefore is, what is essential to render the service in which different persons are engaged a common employment? And this question has caused much conflict of opinion between different courts, and often much vacillation of opinion in the same court.

In *Bartonshill Coal Co. v. Reid*, and the same company v. *McGuire*, reported in 3 Macqueen, 266 and 300 H. L. Cases, decided in 1858, the parties injured were miners employed to work in a coal pit, and the party, whose negligence caused the injury, was employed to attend to the engine by which they were let down into the mine and brought out, and the coal was raised which they had dug; and it was held that they were engaged in a common work, that of getting coal from the pit. 'The miners,' said the court in the latter case, 'could not perform their part unless they were lowered to their work, nor could the end of their common labor be attained unless the coal which they got was raised to the pit's mouth, and of course at the close of their day's labor the workman must be lifted out of the mine. Every person who engaged

Moon's Administrator v. Richmond and Alleghany Railroad Company.

in such an employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person intrusted with the machinery might be occasionally negligent and fail in his duty.' Lord Chancellor CHELMSFORD, who gave the principal opinion in the latter case, referred to previous cases in which the master's exemption from liability had been sustained, and said: 'In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary however in each particular case to ascertain whether the servants are fellow laborers in the same work, because although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants therefore are engaged in different departments of duty, an injury committed by one servant upon another, by carelessness or negligence in the course of his peculiar work, is not within the examination, and the master's liability attaches in that case in the same manner as if the injured servants stood in no such relation to him.' The lord chancellor also commented upon some decisions of the Scotch courts, and among others that of *McNaughton v. Caledonian R. Co.*, 19 Ct. of Sess. Cas. 271, and said that it might be 'sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work, the deceased being a joiner or carpenter, who at the time of the accident was engaged in repairing a railway carriage, and the persons by whose negligence his death was occasioned were the same engine driver and the persons who arranged the switches.' And in the same case Lord BROUGHAM, after mentioning the observations of a judge of the Scottish courts, that an absolute and inflexible rule releasing the master from responsibility in every case where one servant is injured by the fault of another was utterly unknown to the law of Scotland, said that it was also utterly unknown to the law of England, and added: 'To bring the case within the exemption there must be this most material qualification, that the two servants must be men in the same common employment, and engaged in the same common work under that common employment.'

"Later decisions in the English courts extend the master's exemption from liability to cases where the servant injured is working under the direction of a foreman or superintendent, the grade of service of the latter not being deemed to change the relation of the two as fellow-servants. Thus in *Wilson v. Merry*, decided by the House of Lords in 1868 on appeal from the Court of Session of Scotland, the sub-manager of a coal pit, whose negligence in erecting a scaffold which obstructed the circulation of air underneath, and led to an accumulation of fire-damp that exploded and injured a workman in the mine, was held to be a fellow-servant with the injured party. And the court laid down the rule that the master was not liable to his servant unless there was negligence on the master's part in that which he had contracted with the servant to do, and that the master, if not personally superintending the work, was only

Moon's Administrator v. Richmond and Alleghany Railroad Company.

bound to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work; that when he had done this he had done all that he was required to do, and if the persons thus selected were guilty of negligence, it was not his negligence, and he was not responsible for the consequences. L. R., 1 H. L. Scotch App. 826. In this case as in many others in the English courts, the foreman, manager or superintendent of the work, by whose negligence the injury was committed, was himself also a workman with the other laborers, although exercising a direction over the work. The reasoning of that case has been applied so as to include, as contended here, employees of a corporation in departments separated from each other; and it must be admitted that the term 'common employment,' under late decisions in England, and the decisions in this country following the Massachusetts case, is of very comprehensive import. It is difficult to limit it so as to say that any persons employed by a railway company, whose labors may facilitate the running of its trains, are not fellow-servants however widely separated may be their labors. See *Holden v. Fitchburgh R. Co.*, 129 Mass. 268.

" But notwithstanding the number and weight of such decisions, there are in this country many adjudications of courts of great learning, restricting the exemption to cases where the fellow-servants are engaged in the same department, and act under the same immediate direction; and holding that within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment. It is not however essential to the decision of the present controversy to lay down a rule which will determine, in all cases, what is to be deemed such an employment, even if it were possible to do so.

" There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated, that subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what

Moon's Administrator v. Richmond and Alleghany Railroad Company.

stations it shall stop, and for what length of time, and every thing essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow-servant with the fireman, the brakeman, the porters and the engineer. The latter are fellow servants in the running of the train under his direction, who as to them and the train stands in the place of and represents the corporation. As observed by Mr. Wharton in his valuable treatise on the Laws of Negligence: 'It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But if this be true it would relieve corporations from all liability to servants. The true view is, that as corporations can act only through superintending officers, the negligence of those officers with respect to other servants are the negligences of the corporation.' § 282 a. The author in a note refers to *Brickner v. New York Cent. R. Co.*, decided in the Supreme Court of New York, and afterward affirmed in the Court of Appeals; and to *Malone v. Hathaway*, decided in the latter court, in which opinions are expressed in conformity with his views. These opinions are not, it is true, authoritative, for they do not cover the precise points in judgment; but were rather expressed to distinguish the questions thus arising from those then before the court. They indicate however a disposition to engraft a limitation upon the general doctrine as to the master's exemption from liability to his servants for the negligence of their fellows, when a corporation is the principal, and acts through superintending agents. Thus in the first case the court said: 'A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee, equally with themselves, represents the corporation as master in all these respects. And though in the performance of these executive duties he may be, and is, a corporation, he is not in those respects a co-servant, a co-laborer, a co-employee, in the common acceptance of those terms, any more than is a director who exercises the same authority.' 2 Lans. 516. Affirmed in 49 N. Y. 672.

'And in *Malone v. Hathaway*, in the Court of Appeals, Judge ALLEN says: 'Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duties, exercising the discretion ordinarily exercised by principals, and within the limits of the delegated authority, the acting principal. These acts are in such case the acts of the corporation, for which and for whose neglect the corpo-

Moon's Administrator v. Richmond and Alleghany Railroad Company.

ration, within adjudged cases, must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care." 64 N. Y. 5, 12; a. c., 21 Am. Rep. 578. See also *Corcoran v. Holbrook*, 59 N. Y. 517; a. c., 17 Am. Rep. 869.

"In *Little Miami R. Co. v. Stevens*, the Supreme Court of Ohio held that where a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the cars were to start, and when to stop, it was liable for an injury received by him caused by the negligence of the conductor. 20 Ohio, 415. There a collision between two trains occurred in consequence of the omission of the conductor to inform the engineer of a change of places in the passing of trains ordered by the company. Exemption from liability was claimed on the ground that the engineer and conductor were fellow-servants, and that the engineer had in consequence taken, by his contract of service, the risk of the negligence of the conductor; and also that public policy forbade a recovery in such cases. But the court rejected both positions. To the latter it very pertinently observed that it was only when the servant had himself been careful that any right of action could accrue to him, and that it was not likely that any would be careless of their lives and persons or property merely because they might have a right of action to recover for injuries received. 'If men are influenced,' said the court, 'by such remote considerations to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation that in any extensive business, where many persons are employed, the care and prudence of the employer is the surest guaranty against mismanagement of any kind.' In *Railway Co. v. Keary*, 8 Ohio St. 201, the same court affirmed the doctrine thus announced, and decided that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible, holding that the conductor in such case was the sole and immediate representative of the company upon which rested the obligation to manage the train with skill and care. In the course of an elaborate opinion the court said that from the very nature of the contract of service between the company and employees, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. 'For this purpose,' said the court, 'the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner, and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls every thing, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely

Moon's Administrator v. Richmond and Alleghany Railroad Company.

separate and distinct, although both necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over the other.'

" In *Louisville & Nashville R. Co. v. Collins*, 2 Duvall, 114, the subject was elaborately considered by the Court of Appeals of Kentucky. And it held that in all those operations which require care, vigilance and skill, and which are performed through the instrumentality of superintending agents, the invisible corporation though never actually, is yet always constructively present through its agents who represent it, and whose acts within their representative spheres are its acts; that the rule of the English courts, that the company is not responsible to one of its servants for an injury inflicted from the neglect of a fellow-servant, was not adopted to its full extent in that State, and was regarded there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason. In commenting upon this decision in his treatise on the Law of Railways, Redfield speaks with emphatic approval of the declaration that the corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority. 'The consequences of mistake or misapprehension upon this point,' says the author, 'have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company. We trust that the reasonableness and justice of this construction will at no distant day induce its universal adoption.' Vol. 1, 554.

" There are decisions in the courts of other States, more or less in conformity, with those cited from Ohio and Kentucky, rejecting or limiting to a greater or less extent the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding — and the present case requires no further decision — that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.

" If now we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language in some sentences may be open to verbal criticism; but its purport touching the liability of the company is, that the conductor and engineer, though both employees, were not fellow-servants in the sense in which that term is used in the decisions; that the former was the representative of the company, standing in its place and stead in the running of the train, and that the latter was in that particular his subordinate, and that for the former's negligence, by which the latter was injured, the company was responsible.

" It was not disputed on the trial that the collision which caused the injury

Moon's Administrator v. Richmond and Alleghany Railroad Company.

complained of was the result of the negligence of the conductor of the freight train, in failing to show to the engineer the order which he had received, to stop the train at South Minneapolis until the gravel train, coming on the same road from an opposite direction, had passed; and the court charged the jury that if they so found, and if the plaintiff did not contribute to his injury by his own negligence, the company was liable, holding that the relation of superior and inferior was created by the company as between the two in the operation of its train; and that they were not within the reason of the law fellow-servants engaged in the same common employment.

"As this charge was in our judgment correct, the plaintiff was entitled to recover upon the conceded negligence of the conductor. The charge on other points is immaterial; whether correct or erroneous, it could not have changed the result; the verdict of the jury could not have been otherwise than for the plaintiff. Without declaring therefore whether any error was committed in the charge on other points, it is sufficient to say that we will not reverse the judgment below if an error was committed on the trial which could not have affected the verdict. *Brobst v. Brock*, 10 Wall. 519. And with respect to the negligence of the conductor of the gravel train, no instruction was given or requested."

[*Contra: Nashville, etc., R. Co. v. Wheless*, 10 Lea, 741; s. c., 48 Am. Rep. 317; *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 77; s. c., 41 Am. Rep. 552, *Slater v. Jewett*, 85 N. Y. 61; s. c., 39 Am. Rep. 627; *Rodman v. Michigan Central R. Co.*, 20 N. W. Rep. 788, Sup. Ct. Mich.; *Cassidy v. Maine Cent. R. Co.*, 70 Me. 488.—REP.]

CASES
IN THE
SUPREME COURT
OF
INDIANA.

CITY OF VALPARAISO V. GARDNER.

(97 Ind. 1.)

Constitutional law — limit of municipal indebtedness.

Although the Constitution forbids any municipal corporation to incur an indebtedness exceeding a specified percentage of its taxable property, yet a city may contract for a necessary supply of water for twenty years at an expense in the aggregate exceeding that limit, but to be defrayed annually, as the water is furnished, and not exceeding the constitutional limit in any year.

ACTION for injunction. The opinion states the case. The injunction was granted below.

E. D. Grumpacker, H. A. Gillett and A. D. Bartholomew, for appellants.

W. Johnston, for appellee.

ELLIOTT, C. J. The complaint of the appellee avers that he is a resident taxpayer of the city of Valparaiso; that the municipal officers are about to let a contract to a water-works company for supplying the city with water for a period of twenty years, at an

City of Valparaiso v. Gardner.

annual expense to the municipality of \$6,000; that the corporate indebtedness exceeds five per centum of the assessed value of the taxable property of the city and that there is no money in the treasury. The prayer of the complaint is for an injunction restraining the corporate authorities from entering into the contract.

The appellants answered, admitting that the appellee was a taxpayer; that the city was indebted in excess of two per centum of the aggregate value of the taxable property, and averring that the city has a population of over five thousand persons and is rapidly increasing in population; that it has no facilities for extinguishing fires except three cisterns, which are wholly inadequate; and that the safety of the city demands that the contract mentioned in the complaint be entered into and a supply of water secured; that the assessed value of taxable property, as shown by the assessment roll, amounted to \$1,350,000; that from other sources than taxation the revenue of the city is \$2,500 per annum; that the ordinary current expenditures are less than \$6,000 per annum, and that the annual revenues of the city are sufficient to pay all the ordinary expenditures of the city and the water rent of \$6,000 per annum, besides providing for the accumulation of a sinking fund, as the law requires; that the intention was that the terms of the proposed contract should be so adjusted that when the water-works were completed and an installment of rent earned, there would be money sufficient in the treasury to pay it, derived from current revenues, and to so fix the time of the payment of future installments that they should be within the current revenues of the city, and yet leave money sufficient to meet all other corporate expenses.

A tax payer of a municipal corporation may maintain a suit to enjoin the corporate authorities from entering into an unauthorized contract. *Sackett v. City of New Albany*, 88 Ind. 473; s. c., 45 Am. Rep. 467; *City of Madison v. Smith*, 83 Ind. 502; *Noble v. City of Vincennes*, 42 id. 125; 2 Dill. Mun. Corp. (3d ed.), § 922.

A city has authority to make contracts for a supply of water for the public use. *City of Vincennes v. Callender*, 86 Ind. 484. The authority is, in a general sense, a discretionary one, but it is by no means without limitation. The authority is so far of a discretionary character as to authorize the corporate officers to determine when the wants of the city demand a supply of water, and with

this decision courts cannot interfere. But the power cannot be so exercised as to create a corporate debt beyond that limited by law, nor can it be so exercised as to surrender or suspend legislative power. While it is true that courts will not interfere with the exercise of discretionary powers, it is also true that they will interfere to prevent an abuse of discretion, or to prevent the corporate officers from transcending their authority. It is also true that courts will not interfere with mere matters of municipal legislation, but when the legislation is sought to be made effective by a ministerial act then courts will interfere in cases where the act transcends the authority of the corporate officers. Dill. Mun. Corp., §§ 308, 927, 1048. The execution of a contract is a ministerial act, and if the contract is one in excess of the corporate authority, its execution may be enjoined.

The important and controlling question which confronts us here is as to the power of the municipal corporation to enter into the contract described in the pleadings. We have no doubt that the corporation had authority to contract for a supply of water for a period of twenty years, and that the contract cannot be overthrown solely on the ground that it is a surrender of legislative power. There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for houses, for gas, for water and the like is neither a judicial nor a legislative power, but is a purely business power. The question is however so firmly settled by authority that we deem it unnecessary to further discuss it. *City of Indianapolis v. Indianapolis, etc., Co.*, 66 Ind. 396; Dill. Mun. Corp. (3d ed.), §§ 473, 474, authorities n.

In 1881 an amendment to the Constitution was adopted, in which this provision is incorporated: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate, exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporation, shall be void." This provision received consideration in *Sackett v. City of New Albany*, 88 Ind. 473, but the question there presented and decided was very different from that which here faces us. The point decided in that case was that a city could not issue bonds for

City of Valparaiso v Gardner.

current expenses where there were no funds in the treasury and the existing indebtedness exceeded two per centum of the value of the taxable property of the municipality. There the question was not whether the claim which the municipal officers were about to pay in bonds was or was not a debt within the meaning of the Constitution; while here that is the question, so that we come to the decision of this case unfettered by any former adjudication of this court.

The question is a grave one, and not entirely without difficulty. If we hold that the contract to pay an annual water rent of \$6,000 during a period of twenty years creates a debt for the aggregate sum of \$120,000, and is a debt within the prohibition embodied in the Constitution, we should lay down a principle that would, in a great majority of instances, put an end to municipal government. If it be true that an agreement to pay a given sum each year for a long period of years constitutes a debt for the aggregate sum resulting from adding together all the yearly installments, then it is extremely doubtful whether there is a city in the State that has authority to repair a street, dig a cistern or build a sidewalk, for nearly every city has contracts for gas and water supplies running for a long series of years, in which the aggregate amount of annual rents would of themselves equal, if not exceed, the limit of two per centum on the value of taxable property. We know, as matter of general knowledge, that water works and gas works require the outlay of enormous sums of money, and that such enterprises are not undertaken under contracts running for short periods of time. If the aggregate sum of all the yearly rents is to be taken as a debt within the meaning of the Constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the rigor of the words used, that the framers of the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities or to leave them without water or light. Nor are we to presume that the electors were ignorant of the existence, condition and necessities of our great towns and cities. On the contrary, we are to presume that these things were known to the electors, and that they intended to foster the best interests of these instrumentalities of local government. An error frequently finds its way into trains of reasoning from the assumption, often made, that the officers are the corporation. This assumption is radically

erroneous, for it is the inhabitants, and not the officers, who constitute the public corporations of the land. *Grant Corp.* 357; *Lowber v. Mayor, etc.*, 5 Abb. Pr. 325; *Clarke v. City of Rochester*, 24 Barb. 446. To deny the right to procure water and light is to deny it to the inhabitants of the towns and cities, and these form no inconsiderable part of the population of the State. We cannot therefore by mere intendment declare that the electors of the State meant to lay down a rule that should practically take from the inhabitants of our cities the power to supply themselves with water or light. To reach the conclusion that they meant to do this, we must find clear warrant in the language of the constitutional provision itself. We agree that if it be found that the language used is clear and explicit, we must give it effect, no matter how disastrous the consequences may be. While it is our duty to yield to the words of the Constitution, still in determining what meaning they were intended to have, it is proper to consider the circumstances under which the provision was adopted and the object it was intended to accomplish. *Cooley Const. Lim.* (5th ed.) 78, 79.

In view of the warring among the adjudged cases it is not easy to affirm that the word "debt" has a firmly settled meaning. In one case it was said, "But the compensation to this contractor was not a debt within the sense of this provision, until the service was performed and the contractor was entitled to be paid. It was, no doubt, an obligation, in some sense, from the time the contract was entered into, but it was not a debt in the popular sense" of the term. *Weston v. City of Syracuse*, 17 N. Y. 110. A similar definition is annexed to the word in the opinion of the court, written by the eminent jurist, Judge DENIO, in *Garrison v. Howe*, 17 N. Y. 458. It was said in *Wentworth v. Whittemore*, 1 Mass. 471, "but whenever it is uncertain whether any thing will ever be demandable by virtue of the contract it cannot be called a debt." By the Supreme Court of California it was said: "A sum payable upon a contingency however is not a debt, or does not become a debt until the contingency has happened." *People v. Arguello*, 37 Cal. 524. In *Sackett v. City of New Albany*, *supra*, this language was used: "By 'indebtedness,' in this connection, we mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement." Conceding that there are cases giving

City of Valparaiso v. Gardner.

the word "debt" a somewhat different meaning from that affixed to it by these authorities, still they are sufficient to prove, at least, that the word cannot be said to have a firmly settled meaning. It is not necessary for us to decide that the meaning given the word in the cases cited is that which the word invariably possesses, for it is sufficient for our purpose to assume that its meaning is not so fixed and definite as to forbid construction. The word used in the construction is "indebted," but without ascertaining what the word "debt" means we cannot affix a meaning to that word, for its popular meaning is "placed in debt," or as Worcester puts it, "being in debt." It is obvious that a corporation owing no debt cannot be indebted.

Our leading purpose is therefore to ascertain what meaning the authors of the Constitution intended the word "indebted" to have, and we address ourselves to its accomplishment. It is clear that if the city should fail to perform its contract, the recovery would be for damages for a breach of contract, and not the contract rate of compensation, and therefore it cannot be true that the whole of the compensation is certainly demandable by the corporation with which it contracts. It may be that but a small part of even one year's compensation can be recovered. On the other hand, the failure of the water company to perform may put an end to the contract, and that would, of course, terminate all liability of the municipal corporation. There could be no action maintained against the city for the recovery of compensation under the contract without evidence that the water had been furnished, and this proves that there is no indebtedness until the water has been supplied in accordance with the terms of the contract.

The effect of the proposed contract is that the city shall be liable for water as it is furnished and not before. It is not until after the water has been furnished that there can be justly said to be a debt, for while there might be a liability for damages, in case of a breach on the part of the city, there is certainly none under the contract until the city has received that for which it contracted. If it can pay this indebtedness when it comes into existence, without exceeding the constitutional limitation, then there is no violation of the letter, and surely none of the spirit of the Constitution. We are careful to say when the debt comes into existence, and not to say when it becomes due, for between these things there is an essential difference. The object to be accomplished by the

City of Valparaiso v. Gardner.

amendment, the condition and necessities of our municipalities, as known to the authors of the amendment, and the just force of the language employed, authorize us to conclude that the inhibition of the Constitution does not apply to contracts for water to be paid for as the water is furnished, provided it is shown that the contract price can be paid from the current revenues as the water is furnished, and without increasing the corporate indebtedness beyond the constitutional limit.

The adjudged cases sustain our conclusion. The cases upon which our case of *Sackett v. City of New Albany, supra*, is based, were decided by the Supreme Court of Illinois, and having once accepted the decisions of that court as authoritative, it is both consistent and logical to follow them so far as we can without yielding our own deliberate convictions. Happily however the decision of that court declares the rule to be that which we have here endeavored to prove the correct one. The case to which we refer is that of *East St. Louis v. East St. Louis, etc., Co.*, 98 Ill. 415, where the subject was much discussed; three of the members of the court wrote opinions, but there was no dissenting vote. In delivering the opinion of the court, SHELDON, J., set forth the provision of the Illinois Constitution and stated the argument of counsel to be that a contract similar to the one here under discussion violated the Constitution, and said: We do not assent to the correctness of this view. The contract was for the furnishing of an article for nightly consumption by the city during a period of thirty years, fixing the price at which the article should be furnished. There was no indebtedness in advance as any thing being furnished, but indebtedness arose if gas should have been furnished along from night to night during the period of thirty years. The contract provides for the payment, monthly, at the end of each month, the amount that became due for the month then ended. When the company has furnished the gas for a certain month, then there is a liability—an indebtedness arises—and not before, as we conceive. Hence the amounts that might become due and payable under the contract in future years did not constitute a debt against the city at the time of the entering into the contract, within the meaning of the Constitution.” The decision in *Prince v. City of Quincy*, 105 Ill. 138; s. c., 44 Am. Rep. 785, does not overrule the case we have cited, but decides a different point from the one discussed in the extract quoted by us. The point really decided in

City of Valparaiso v. Gardner.

Prince v. City of Quincy, supra, is stated with admirable precision and clearness in the head-note prepared by the editor of the American Reports. The learned editor's statement is this: "Where the Constitution forbids any municipal corporation to become indebted beyond a certain amount 'in any manner or for any purpose,' that amount may not be exceeded even for necessary current expenses."

The clause in our Constitution is, in legal effect and almost in words, the same as that of Iowa, and it is evident that it was taken from the Constitution of that State. It was said in the argument in *Prince v. City of Quincy*, 105 Ill. 215, that the clause in the Illinois Constitution was taken from that of Iowa, and if this be true, then the Illinois courts should have looked to the construction given by the courts of Iowa, for it is a familiar rule that where a clause is taken from the Constitution or statute of another State, it will be deemed to have the meaning given it by the courts of that State. *Langdon v. Applegate*, 5 Ind. 327, is authority upon this point, although it has long since ceased to be authority upon some of the points decided; and the cases of *Fall v. Hazelrigg*, 45 Ind. 576; s. c., 15 Am. Rep. 278, and *Clark v. Jeffersonville, etc., R. Co.*, 44 Ind. 248, are in harmony with that decision upon the point to which we have cited it. Cooley Const. Lim. (5th ed.) 64. Turning to the decisions of the Iowa courts we find abundant support. In *Dively v. City of Cedar Falls*, 27 Iowa, 227, it was held that an obligation arising under a contract to pay for work when it was performed does not constitute an indebtedness within the meaning of the Constitution, and this decision has the approval of Judge Dillon. 1 Dill. Mun. Corp. (3d ed.), § 135. The question was very fully discussed in *Grant v. City of Davenport*, 36 Iowa, 396, where it was held that a contract entered into by the city for the supply of water for a term of years, at an annual rental, is one relating to the ordinary expenses of the city and that the annual rental is not an indebtedness within the meaning of the Constitution. One of the illustrations used in the course of the opinion is so apt that we quote it: "Suppose a man having a family to support is without other means to do it, except his salary, which is adequate for that purpose. He is compelled to rent a house to live in, and by a contract for a term of years he can reduce its cost, and he therefore makes a lease for ten years at \$300 per year, or \$3,000 for the term, the rent being

City of Valparaiso v. Gardner.

payable monthly, quarterly or annually. Has that man created an indebtedness of \$3,000?" The cases of *French v. City of Burlington*, 42 Iowa, 614, and *Burlington Water Co. v. Woodward*, 49 id. 58, sustain the rulings made in the former cases. The case of *Scott Co. v. City of Davenport*, 34 id. 208, decides that where bonds are issued binding the corporation to pay, an indebtedness is created, and the case is distinguished from *Dively v. City of Cedar Rapids*, *supra*. The cases of *State v. McCauley*, 15 Cal. 429, and *People v. Pacheco*, 27 id. 175, go very far to sustain the doctrines laid down by the courts of Iowa.

The Supreme Court of Pennsylvania, in *Appeal of the City of Erie*, 91 Penn. St. 398, held that an agreement binding the corporation to pay an annual rent for property created an indebtedness within the meaning of the Constitution, but in the course of the opinion said: "Many authorities have been cited for the defense, none of which seem to us to bear upon the point in issue. There is one however which we notice because of its general pertinency. In Dillon on Municipal Corporations, section 88, the learned author cites an Iowa case, involving the validity of a contract by a city for a supply of water, in which it is said: 'When a contract, made by a municipal corporation, pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the "incurring of indebtedness" within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts.'" This we hesitate not to say is a sound constitutional interpretation, and in a similar case might well be adopted in the construction of our own Constitution. If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created. Had the defendant in the bill before us, instead of demurring, made answer that its annual revenues were sufficient, over and above the payment of the interest of its indebtedness and the ordinary expenses of the city government, to meet the rent proposed to be paid, a very different case would have been presented for consideration. But the demurrer, admitting, as it does, the allegations of the bill, raises the single

City of Valparaiso v. Gardner.

question of the power of the city to contract a new debt, notwithstanding its present indebtedness exceeds the constitutional limit, and this without reference to its resources or present ability to meet and pay the contract intended to be entered into." The case of *Coulson v. City of Portland*, Deady, 481, does not involve the question we are here discussing, for the court stated the question there decided to be, "Can the city lawfully issue interest coupons to railway bonds, payable half yearly through a period of twenty years, and amounting in the aggregate to over \$300,000?"

We have reviewed all the cases cited by counsel, and such others as we have been able to find upon a diligent search, and are satisfied that the conclusion we have reached is in harmony with the decisions made in cases where the question has been considered and decided, and is not opposed in principle to any of the cases bearing upon the general question.

We have assumed that the supply of water is necessary to the welfare of the inhabitants of the municipality, and that it constitutes one of the items of current expenditure essential to the welfare of the corporation, and this assumption rests upon the facts pleaded in the answer. This distinguishes the case, as is well shown in *Grant v. City of Davenport*, *supra*, from the cases in which property is purchased or subscriptions made to the capital stock of railroad or other corporations. It is the items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, that constitute current expenses payable out of current revenues. The authorities agree that current revenues may be applied to such purposes even though the effect be to postpone judgment creditors. *Coy v. City Council*, 17 Iowa, 1; *Coffin v. City Council*, 26 id. 515; *Grant v. City of Davenport*, *supra*. When the current revenues are sufficient to fully pay the current expenses necessarily incurred to maintain corporate life, there cannot be said to be any debt. We do not assert that a debt may be created even for current expenses, if its effect will be to extend the corporate indebtedness beyond the constitutional limit, but we do assert that where the current revenues are sufficient to defray all current expenses without increasing the indebtedness, there is then no corporate debt incurred for such expenses. To illustrate our meaning, suppose a laborer is employed on the first day of April to render services on the first day of May; that on the day of the employment there is no money in the treasury, but on the first day

May, when the services are rendered, there will be more than enough yielded by the current revenues; there is in such a case really no debt. Again, suppose that on the first day of April gas is needed for that month, and that on each day of that month the current revenues are sufficient to pay each day's gas bill, there will be no debt even though there was not sufficient money to pay the month's account in the treasury on the day the contract was made. Such contracts do not create a debt prior to the rendition of the services in the one case, or to the furnishing of gas in the other; they simply devote to current expenses current revenues. While as decided in *Sackett v. City of New Albany, supra*, the debt cannot be made to exceed the constitutional limit even for current expenses, no matter how urgent, yet current revenues, as they come in, may be used to defray such expenses, and if they are sufficient for that purpose, then no debt is created.

If a bond, note, or other obligation is executed, then doubtless a debt is created, for such things constitute evidences of indebtedness, but that is not the case here. So if the consideration of the contract is received at once, instead of being yielded in the future or at intervals, then it might be said that there was a debt, but where there is nothing owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary yearly expenses of the municipality, there will be no debt, if when the thing is done or furnished there will be money in the treasury, yielded by current revenues, sufficient to fully pay the claim without encroaching upon other funds. This we understand to be the case made by the answer, and we think it a case not within the inhibition contained in the constitutional amendment.

If a different view be taken from that which we maintain, startling results would follow in the application of the principle to other cases. Take, for instance, a merchant having a large number of clerks employed for a year each, and at a fixed salary, could such a merchant in making out his tax-list deduct the aggregate amount of all the salaries computed to the end of the year, on the ground that it constituted an indebtedness? Take again the same supposed case, and would any one say that the merchant's solvency was to be determined by taking into consideration the aggregate of the salaries that would be due his clerks at the end of the year? Take for another example, the case of a private corporation actively engaged in business: could it be pushed to the wall on the ground

Wiley v. Baumgardner.

that it was insolvent, by evidence that it had contracted with a large number of men for a year's service, and that the aggregate sum due at the end of the year would be much greater than the value of its property at the opening of the year? Take still another example, a municipal corporation — and here there need be no supposition — with its officers (some of them with terms of several years), its policemen and its firemen, is it indebted, at the beginning of the year, for the grand aggregate of all the salaries to the end of all the terms? In the case of the merchant and of the private corporation, it certainly would be held, without hesitation or doubt, that if the current income or profit would discharge the obligations there would be no indebtedness; and this must be true of municipal corporations in cases where there will be money in the treasury, derived from current revenues, sufficient to pay for services rendered or things furnished, as part of the current corporate expenses, when the services are rendered or the things actually furnished. Expenses of such a character should be deemed incidental expenses of the corporate business, and not debts, and as long at least as the current revenues will pay these expenses without taking from funds devoted to other purposes by command of the corporate charter what properly belongs to them, there is no indebtedness within the meaning of the Constitution.

Judgment reversed, with instructions to overrule the demurrer to the answer, and to proceed in accordance with this opinion.

WILEY V. BAUMGARDNER.

(97 Ind. 68.)

Contract — restraint of trade.

On the sale of a stock of goods and a lease, the seller engaged not to re-engage in that business for five years. *Held*, void.*

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

* See *Hubbard v. Miller* (27 Mich. 15), 15 Am. Rep. 153.

Wiley v. Baumgardner.

J. S. Dailey and L. Mock, for appellant.

J. Morris and T. W. Wilson, for appellees.

BLACK, C. The complaint, in an action brought by the appellees against the appellant, consisted of a number of paragraphs, to all of which except the third demurrers were sustained. A demurrer to the third paragraph, for want of sufficient facts, was overruled. This ruling alone is assigned as error.

The action was upon a contract in writing, by which the appellant sold to the appellees the former's entire stock of dry goods, boots and shoes, merchandise and fixtures in his store in Bluffton, at cost, less a certain per cent, and agreed to transfer to them his lease on the building occupied by him for his store-room, and his unexpired insurance on said stock, and agreed "not to engage in the dry goods business for a term of five years from" the date of the agreement, being the 29th of December, 1881, the appellees agreeing on their part, by way of payment, to transfer to the appellant a certain farm, which was to represent the sum of \$6,000, to execute to him their promissory note for \$1,000, and for the balance to execute their promissory notes, secured by mortgage on certain lands of one of the appellees. And it was agreed by all the parties that "for the faithful performance of the above contract, we hereby bind ourselves to each other in the sum of \$1,000, liquidated damages."

It was alleged that the appellees intending to engage in the dry goods business in said town, the contract was entered into by them and the appellant for such purpose; that immediately after the purchase the appellees engaged in said business in said town, and that they were still continuing the same. The breach alleged was that in September, 1882, the appellant purchased a large stock of dry goods, of the value of \$10,000, and with them opened a dry goods store in said town, within a few doors of the place of business of the appellees, and engaged in the dry goods business in said town, and still continued the same; that during the time he had been thus engaged in business, he had sold a large amount of dry goods in said town, the amount of \$10,000, thereby taking away from the appellees said trade, to their damage \$1,500, for which they demanded judgment.

The only question to be decided is whether the agreement in restraint of trade was valid.

Wiley v. Baumgardner.

A contract in restraint of trade is void, if the restraint be unreasonable, and the question as to the reasonableness of the restriction is one of law, to be determined by the court; and the contract is supported or avoided on grounds of public policy. "Whatever restraint is larger than the necessary protection of the party with whom the contract is made, is unreasonable and void, as being injurious to the interests of the public, on the ground of public policy." *Mallan v. May*, 11 M. & W. 653, quoting from *Horner v. Graves*, 7 Bing. 735. See also *Beard v. Dennis*, 6 Ind. 200; *Harrison v. Lockhart*, 25 id. 112; Whart. Cont., § 433, and authorities there cited.

In the contract now before us, the transaction was not expressed as a sale of the good-will of the business, or as a sale of the business. But it would have made no difference if there had been an express sale of the good-will. Where a person carrying on any business sells his stock in trade, or his business and his good will, and in the transaction agrees not to carry on the same business, with a limitation upon the restraint as to time but none as to space, the agreement as to such restraint is wholly void.

This must be so if the test be that the contract is to be supported or avoided on the ground of public policy. If it be prejudicial to the public interest for a citizen to be debarred from pursuing anywhere the calling in which he has acquired skill or proficiency, or to encourage the establishment of monopolies by preventing competition, it must be so for definite as well as for indefinite periods of time. A contract that would put it in the power of one party to prevent the other from carrying on his calling anywhere whatever is unreasonable.

PARKE, B., in *Ward v. Byrne*, 5 M. & W. 548, said: "When a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of a total restriction on trade, limited only as to time." All the judges concurred.

Whittaker v. Howe, 3 Beav. 383, it is said by Mr. Benjamin (Benj. Sales, § 525), "has been practically overruled in the later cases;" and *Rousillon v. Rousillon*, L. R., 14 Ch. D. 351; 35 Am. Rep. 269, is distinguished in Wharton on Contracts, section 430 *et seq.*, and notes, as involving a question of breach of trust.

A restraint unlimited as to space has been held not unreasonable where the subject-matter of the contract was a trade secret. *Leather Cloth Co. v. Lorseant*, L. R., 9 Eq. Cas. 345.

Where the restraint is applied in the contract to a limited and reasonable space, and also extended to an unlimited or unreasonable space, the contract may be held to be divisible, and the restriction as to the reasonable limits expressed may be enforced; as a covenant not to enter into the manufacture of matches in St. Louis or any other place for five years was held valid as to St. Louis. *Peltz v. Eichele*, 62 Mo. 171. See also *Mallan v. May*, *supra*; *Nicholls v. Stretton*, 10 Q. B. 346.

The restraint in the case at bar cannot be enforced. The question, whether the sum in which the contract purported to bind the parties for faithful performance should be regarded as liquidated damages or as a penalty, is not before us and is immaterial.

The judgment should be reversed.

PER CURIAM. It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellees, with instruction to sustain the demurrer to the third paragraph of the complaint.

Petition for rehearing overruled.

RICE v. NIXON.

(97 Ind. 97.)

Bailment — storage of grain — fire.

Where a warehouseman receives grain on storage, and puts it in a bin with his own and that belonging to others, and sells therefrom, always reserving enough to answer the demand of each owner, he is not liable to the depositors for loss by fire not attributable to his fault.*

ACTION for grain stored. The opinion states the case. The defendant had judgment below.

J. S. Nave. B. F. Hegler, W. S. Potter and A. A. Rice, for appellants.

T. F. Davidson, for appellee.

* To same effect, *Bottenberg v. Nixon*, 97 Ind. 106.

Rice v. Nixon.

ELLIOTT, C. J. The appellee was a warehouseman, and it was his custom to receive wheat on deposit and to place it in a common bin with wheat bought by him, and it was also his custom to sell wheat from this bin, but of this custom the appellants had no knowledge. In August, 1882, the appellant Victoria Rice deposited with the appellee two hundred and ten bushels of wheat; this was thrown into the common bin in accordance with the custom of the appellee, and with it was mingled wheat bought by him and wheat stored by other depositors, and from this bin wheat was sold, from time to time, but there was always in the bin wheat enough to supply all depositors, and at any time before the destruction of the warehouse by an accidental fire the appellant could have received from the bin all the wheat she had deposited. Some time after the storage of the wheat the warehouse and all its contents were destroyed by fire, but the fire was not attributable to the wrong or negligence of the appellee. No demand was made for the wheat until after its destruction. The wheat was stored with the appellee, and there was no agreement that the bailor should have an option to demand the grain or its value in money.

There are cases in which a bailee is responsible for the loss of goods where he commingles them with his own, but this principle does not apply where a warehouseman receives grain to be stored for the owner. Articles of such a character can be separated by measurement, and no injury result to the owner from the act of the warehouseman in mingling them with like articles of his own. This doctrine is older, at least, than *Lupton v. White*, 15 Vesey Jr. 432, for there Lord ELDON said: "What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." Chancellor Kent takes a like view of the question and his last editor, Judge Holmes, cites a great many cases upon the subject. 2 Kent Com. (12th ed.) 365, 590. This is the view taken by the text-writers and courts generally in cases where the deposit is made with a warehouseman. Story Bail., § 40; Law of Prod. Ex., § 152; 2 Schouler Pers. Prop., § 46; 6 Am. Law Rev. 457; 2 Bl. Com. (Cooley's ed.) 404, n. There is however, as shown

by the cases cited, some conflict of opinion, but as said in a late work, the great weight of authority is that the contract is one of bailment and not of sale, the warehouseman and the depositor becoming owners as tenants in common. Law of Prod. Ex., § 154, auth. n. 9.

To the authorities cited by the authors referred to may be added *Ledyard v. Hibbard*, 48 Mich. 421; s. c., 42 Am. Rep. 474; *Nelson v. Brown*, 44 Iowa, 455; *Sexton v. Graham*, 53 id. 181; *Nelson v. Brown*, id. 555; *Irons v. Kentner*, 51 id. 88; s. c., 33 Am. Rep. 119, where the rule is carried much farther than is necessary in the present instance. The rule which we accept as the true one is required by the commercial interests of the country, and is in harmony with the cardinal principle that the intention of contracting parties is always to be given effect. It is not unknown to us, nor can it be unknown to any court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses, and it cannot be presumed that warehousemen in receiving grain for storage, or depositors in intrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels, or of a few hundred, should be placed in separate receptacles; on the contrary, the course of business in this great branch of commerce, made known to us as a matter of public knowledge and by the decisions of the courts of the land, leads to the presumption that both the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted, and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass, should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place for each depositor, then the fact that he puts it in a common receptacle with grain of his own and that of other depositors does not make him a purchaser, and if he is not a purchaser, then he is a bailee. In all matters of contract the intention of the

Rice v. Nixon.

parties gives character and effect to the transaction, and in such a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale. The duties, rights and liabilities of warehousemen are prescribed by the law as declared by the courts and the legislature, and as matter of law, it is known to us that a warehouseman, by placing grain received from a depositor in a common receptacle, and treating it as the usages of trade warrant, does not become the buyer of the grain, unless indeed there is some stipulation in the contract imposing that character upon him.

The cases in our own reports, cited by counsel for the appellants, do not oppose the conclusion here reached. In *Pribble v. Kent*, 10 Ind. 325, the defendants received of the plaintiff one hundred and thirty-two bushels of grain, and on demand failed to deliver the wheat, and it was held that an action would lie, but the contract was held to be one of bailment, and not of sale. It is plain therefore that in the case cited there was no such ruling as that asked by the appellants in the present case; on the contrary, the ruling overturns their theory. In *Ewing v. French*, 1 Blackf. 353, and *Carlisle v. Wallace*, 12 Ind. 252, the wheat was delivered to a miller to be ground into flour, and this was held to be a sale, on the ground that the character of the article was to be entirely changed, and a new and different article was to be given by the miller to his customer in return for the wheat. In the last of the cases cited the option of demanding wheat, flour or money was vested in the depositor, so that he had the option of making the contract one of bailment or one of sale, and he exercised that option by treating the transaction as a sale. In the case under examination there was no option, for it is expressly found that the wheat was received by the warehouseman for storage. The case of *Ashby v. West*, 3 Ind. 170, holds that one who delivers wheat to be manufactured into flour is the owner of the flour, and may maintain replevin, the court saying: "We are clearly of the opinion that that contract is one of bailment, and not of sale," and this is against the contention of the appellants.

In deciding that the contract was one of bailment, and not of sale, we determine the only debatable question in the case, for it has been long settled that where property in the custody of a bailee is destroyed by an accidental fire, and there has been no fault or negligence on his part, he is not liable.

We have examined the rulings on the demurrers to the answers and think they were correct, but if we were wrong in this there could be no reversal, because the special finding clearly shows the ground on which the judgment rests, and from this it appears that if the rulings were erroneous the errors were harmless.

Judgment affirmed.

Yerkes v. Sabin.

YERKES V. SABIN.

(97 Ind. 141.)

Ferry — responsibility for horses.

A ferryman, receiving horses in charge of a driver for transportation, is not liable for an accident to them, in the absence of negligence on his part.*

ACTION for injury to a horse. The opinion states the case. The defendant had judgment below.

T. F. Davidson, for appellant.

J. Jump and *C. W. Ward*, for appellee.

BLACK, C. The appellant brought his action against the appellee to recover damages for an injury to a horse of the plaintiff, occasioned by the negligence of the defendant. There was an answer of general denial, and upon a trial by the court a special finding was rendered, to the conclusions of law in which the plaintiff excepted. He also moved, unsuccessfully, for a new trial.

The court found "that on the 21st day of November, 1883, and for more than fifteen years prior thereto, the defendant was engaged in running a ferry-boat for hire, for the ferriage of persons, teams, stock and freight across the Wabash river at the town of Perrysville; that the defendant's ferry-boat was an ordinary ferry-flat, forty feet in length and eight to ten feet in width, having at each end an apron or platform, extending across the boat, and three or four feet in width, used to anchor the boat to the shore and to make the entrance to and exit from the boat more safe and convenient for teams and vehicles; that the apron was attached to the boat by strap hinges, and there was a space of two and one-half inches intervening between the boat and the apron. The court further finds that on said 21st day of November, 1883, the plaintiff drove his team of horses, attached to a wagon loaded with wheat, upon the defendant's ferry-boat, for the purpose of being ferried across from the east to the west bank of the river; that the stream was safely crossed, and the boat anchored to the western shore of the river, and the plaintiff was directed by the defendant to drive his team off the boat, and that he undertook to do so; that as the team was in the act of crossing the apron from the boat to the shore, one of the plaintiff's horses became frightened at some object on the shore or boat, and shied, crowding the other animal off into the mud and water; that the horse still remaining upon the apron, in his struggles, slipped the small part of his leg, that

* See *Dudley v. Camden, etc., Ferry Co.* (18 Vr. 25), 36 Am. Rep. 501.

Yerkes v. Sabin.

part between the pastern-joint and the knee, into the crack between the apron and the boat; that this was done from the outer side of the apron; that it was not possible for the horse to get his foot down through the crack; that while the animal's leg was so fastened in the crack, he lunged forward and broke it, totally destroying the usefulness and value of the animal, and it thereby became necessary to kill him. The court further finds that the animal was of the value of one hundred dollars, and that the plaintiff retained the custody and control of his team while on the defendant's boat; that he exercised due care and caution in its management, and paid the defendant the regular price of ferriage for taking him and his team across the river. The court further finds that the defendant had constantly used the boat, with its aprons attached as they were at the time of the accident to the plaintiff's horse, for four years, and that many teams had been landed from the boat daily during that time, except when the river was impassable, and that no similar accident had ever occurred before, and that for the ten years before that time he had used a boat with aprons similarly attached, from which teams had daily landed, except when the river was impassable, and that during that time no such accident has happened."

The court stated as its conclusion of law "upon the foregoing facts, that the defendant is not liable to the plaintiff for the injury sustained by the plaintiff's horse."

When one engaged in the business of a ferryman for hire, in the course of such business, receives upon his ferry-boat for transportation a traveller with horses attached to a vehicle and driven by the traveller, who retains possession and control of the horses and vehicle upon the boat, the responsibility of the ferryman in relation to such animals is not the common-law responsibility of a common carrier of goods in his exclusive custody and control. In such a case the ferryman has certain duties to perform, and is liable for loss or injury occurring through his neglect to perform them, unless there be contributory fault on the part of the traveller. Among these is the duty to provide reasonably safe and convenient means for the departure from the boat of horses and vehicles transported thereon. *White v. Winnisimmet Co.*, 7 Cush. 155; *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32; s. c., 11 Am. Rep. 650; *Harvey v. Rose*, 26 Ark. 3; s. c., 7 Am. Rep. 595; *Lewis v. Smith*, 107 Mass. 334; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312; Schoul. Bailm. 433; Whart. Neg., § 706, *et seq.*

The complaint in the case at bar charged that the injury to the horse occurred through the negligence of the defendant, in keeping and maintaining his boat in an unsafe and dangerous condition, and without any fault or negligence of the plaintiff. The question of the negligence of the defendant was in issue, and the burden of showing his negligence was upon the plaintiff.

The court did not find whether or not the defendant was negligent. Among the facts stated in the finding were evidential facts relating to this question. Whether any of the facts stated did not

constitute proper evidence need not be decided. Without a finding showing defendant's negligence, there could be no conclusion of law against him.

In *Parker v. Hubble*, 75 Ind. 580, there was a special finding in which the court did not state an ultimate fact, the burden of proving which was upon the party in whose favor the conclusion of law was stated; but matter of evidence tending to prove such fact was set out in the finding. This court, in reversing the judgment for error in the conclusion of law because of the want of a finding of such fact, granted leave to move for a *venire de novo* to the appellee, thus appearing on the face of the special finding to be entitled to a finding as to such fact.

But in the case now before us the burden of proving the fact which the court did not find was upon the party excepting to the conclusion of law, and the conclusion was right upon the facts found.

The only cause assigned in the motion for a new trial, stated in different forms, was that the finding was not sustained by sufficient evidence. All the facts stated in the finding were sustained by the evidence, though as to some of them there was conflicting testimony.

The judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the appellant's costs.

ON PETITION FOR REHEARING.

ELLIOTT, C. J. We have examined the argument on the petition for a rehearing with care, but find no reason to doubt the soundness of our conclusion expressed in the opinion heretofore filed.

It is undoubtedly the law that a common carrier is *prima facie* liable, where it is proved that the passenger took passage and was injured without fault on his part, unless the evidence proving the accident also shows that the injury was not attributable to the negligence of the carrier. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346; *Memphis, etc., Co. v. McCool*, 83 id. 392; s. c., 43 Am. Rep. 71; *Pittsburgh, etc., R. Co. v. Williams*, 74 Ind. 462. But this rule does not govern this case. Here the owner took his horses on board the ferry-boat and remained in charge of them. If the ferryman had all the suitable and reasonable accommodations for safe conveyance, and used due care, he is not liable for an injury to horses taken on the boat and kept in charge of the owner. *Whart. Neg.*, § 707, auth. n. There is in this case no finding that the boat was not reasonably safe; on the contrary, the inference is that the accident occurred not because the boat was not suitably constructed but because one of the horses, becoming unmanageable, crowded the other horse off the boat and thrust his own leg into the opening between the boat and the apron. There is no finding that the opening was caused by the defective construction of the boat, or

Lanman v. Crooker.

that it was caused by the negligent act of the appellee; for aught that appears the boat may have been properly constructed and managed with due care. *Kennedy v. Mayor*, 73 N. Y. 365; s. c., 29 Am. Rep. 169, is not at all in point, for there the court took the case from the jury on the ground that the unmanageability of the horse was the cause of the accident.

It is an old and well settled rule that a party who has the burden cannot have a judgment, unless all the facts essential to a recovery are stated in the special finding or verdict. *Dixon v. Duke*, 85 Ind. 434. It is equally well settled that no inferences will be made, except inferences of law arising out of the facts. 2 Tidd Pr. 897, auth. n.

Petition overruled.

LANMAN V. CROOKER.

(97 Ind. 168.)

Mortgage — exception — mistake — evidence.

A mortgage was executed upon land, excepting “twenty acres from the north-east corner of said above described tract of land, formerly deeded to Wm. Davis and Emeline M. Davis.” In an action to recover the said twenty acres *held*, that parol evidence was admissible to show that the twenty acres intended to be excepted was not in the north-east corner, but off the south end.

ACTION to recover land. The opinion states the case. The plaintiff had judgment below.

G. W. Best and J. M. Vanfleet, for appellants.

H. D. Wilson and W. J. Davis, for appellee.

BEST, C. The appellee brought this action to recover twenty acres of land, in a square form, out of the north-east corner of the west half of the south-east quarter of section nineteen, township thirty-seven north, of range five east, Elkhart county.

The cause was tried by a jury, a verdict returned for the appellee, and judgment rendered accordingly. A motion for a new trial, on the ground that the court erred in excluding the appellant's evidence, and in charging the jury to find for the appellee, was overruled, and this ruling is assigned as error.

Both parties claim the land in dispute through Harriet Schutt, who on and before August 1, 1866, owned the entire west half of said quarter section.

The appellee claims through a deed made by her and her husband to John Squires on the sixth day of December, 1873.

The appellants claim through a mortgage made by her and her husband on the first day of July, 1868, upon the entire west half of said quarter except twenty acres.

The dispute is whether the land excepted from the mortgage is the land sought to be recovered. If it is, the appellee is entitled to recover, and if it is not, the appellants are entitled to recover. This question depends upon the proper construction of the description contained in the mortgage.

The appellee read in evidence the deed from Harriet Schutt and husband to John Squires, and several deeds constituting a regular chain of title from Squires to him. This made for him, as is conceded, a *prima facie* case.

The appellants then offered to read in evidence the mortgage from Harriet Schutt and husband for the west half of the said land except twenty acres thus described: "The west half of the south-east quarter of section nineteen, in township thirty-seven north, range five east, except twenty acres from the north-east corner of said above described tract of land, formerly deeded to Wm. Davis and Emeline Ann Davis."

It was agreed that this mortgage had been duly foreclosed, the land sold upon the decree to the mortgagee, and a sheriff's deed executed by him to one of the appellants, all by such description.

The appellants also offered to read in evidence a deed from Harriet Schutt and husband to Amelia Davis, dated August 29, 1866, for twenty acres of land off the south end of the west half of said quarter section.

They also offered parol testimony to show that when said deed was made Amelia Davis was the wife of William Davis, and that no part of said land had ever been deeded to Wm. Davis and Emeline Ann Davis.

All this evidence was excluded, and the jury was instructed to return a verdict for the appellee.

Did this evidence tend to establish a defense? If it tended to show that the "twenty acres" excepted from the mortgage is not the twenty acres in dispute, then this land was included in the mortgage, and the title is not in the appellee.

The mortgage embraced the entire west half of the quarter section except twenty acres. These are described as "twenty acres from the north-east corner, * * * formerly deeded to Wm. Davis and Emeline Ann Davis." This description contains two calls — one as land in the "north-east corner," and the other as land "formerly deeded to Wm. Davis and Emeline Ann Davis." If this land was never deeded, as stated, then both calls are not correct descriptions, one or the other is false, and if one is true and the other false, the false must be rejected and the description read as though it did not contain the false call. *Worthington v. Hylar*,

Lanman v. Crooker.

4 Mass. 196; *Wuesthoff v. Seymour*, 22 N. J. Eq. 66; *Piper v. True*, 36 Cal. 606.

The first call cannot be said to be false unless the second is true and is different from the first. The falsity of the first is not shown by the language of the description itself, but this may be shown by evidence *aliunde*. *Harris v. Doe*, 4 Blackf. 369; *Symmes v. Brown*, 13 Ind. 318.

This rule applies to property described in a sheriff's deed. *Abbott v. Abbott*, 51 Me. 575; *Lodge v. Barnett*, 46 Penn. St. 477.

It also applies to the description of property acquired through a judicial sale. *Hedge v. Sims*, 29 Ind. 574; *Allen v. Shannon*, 74 id. 164; *Rucker v. Steelman*, 73 id. 396; *Wilson v. Brown*, 82 id. 471.

This rule does not apply where a misdescription runs through such proceedings as in *Rogers v. Abbott*, 37 Ind. 138; *Miller v. Kolb*, 47 id. 220, and *Angle v. Speer*, 66 id. 488, but does apply where the description is merely ambiguous, and hence applies in this case.

The deed offered in evidence showed that twenty acres of this land had formerly been deeded to Amelia Davis. This conveyance corresponds with the description except the names. In this respect there is a variance, but this variance does not, as we think, vitiate the description and render it inapplicable to this land. Without the names the description shows that twenty acres of the land had been formerly deeded, and this conveyance satisfies the description in the absence of proof that some other conveyance had been made to these persons.

In *Getchell v. Whittemore*, 72 Me. 393, a similar question arose. The defendant executed a mortgage upon certain real estate, except a lot which was described as having been conveyed to him by Roswell Hitchcock. Roswell Hitchcock had not conveyed the lot to him, but Urban L. Hitchcock had, and it was held that though the name was different, this fact did not vitiate the description, and that the same applied to the lot actually conveyed.

In *Abbott v. Abbott*, *supra*, the land conveyed was described "as surveyed by Israel Johnson and Isaac Boynton." They had not surveyed the land, but one Harvey had, and the court held that though the names were different, it was a question of fact whether the Harvey line was not intended.

No greater variance exists in this case than in the above cases. After dropping the names an equally sufficient description remains, and this description applies to the land embraced in the conveyance.

Whether it was so intended depends upon the proper construction of the description in the light of the attending circumstances. These may be shown, as has been said, by extrinsic evidence; it may be shown that the twenty acres formerly deeded was off the south end, and not out of the north-east corner. "Thus, if the premises are bounded by land of A. on the north, and A.'s land is on the south, it may be proved that it was intended as the southern boundary. *White v. Eagan*, 2 Bay (S. C.), 247. So, if bounded

on 'Broad river,' it may be proved that 'Catawba river,' was intended. *Middleton v. Perry*, 2 Bay, 539." *Abbott v. Abbott*, *supra*.

The evidence excluded tends to show that no other land was "formerly deeded," and hence tends to show that the excepted land was not in the north-east corner.

If no other land was deeded, we have two conflicting descriptions, one describing twenty acres in the north-east corner, and the other twenty acres off the south end. One or the other must be rejected as obviously both were not intended. The rule in such cases is to apply the description to the land actually owned, and to adopt such construction as best comports with the manifest intention of the parties and the circumstances of the case. *Drew v. Drew*, 8 Foster, 487; *Piper v. True*, *supra*; *Bell v. Sawyer*, 32 N. H. 72.

Applying this rule, in the light of the facts, the excluded evidence tended to prove, we think it manifest, that these parties intended to except twenty acres off the south end. The mortgage embraced the entire west half except twenty acres; the mortgagors owned the entire west half except twenty acres; they excepted twenty acres formerly deeded; the twenty acres formerly deeded were off the south end, and it is therefore apparent that they intended to except such twenty acres. This conclusion is also strengthened by the presumption that they intended to mortgage their own land, and not the land of another.

As the evidence excluded tended to show that the second call was true and the first false, the first may be rejected without impairing the description. *Worthington v. Hyler*, *supra*; *Ousby v. Jones*, 73 N. Y. 621.

The fact that the twenty acres in the north-east corner had not been "formerly deeded" created a latent ambiguity, and as the evidence offered tended to remove it, the court erred in excluding it.

The judgment should therefore be reversed.

PER CURIAM. — It is therefore ordered, upon the foregoing opinion, that the judgment be reversed, at the appellee's costs, with instructions to grant a new trial.

ON PETITION FOR REHEARING.

ELLIOTT, C. J. We have for the second time carefully investigated the questions in this case, and have found no reason to change our former opinion.

The question is whether the excluded evidence was competent; its weight and effect were matters for the jury. The evidence did tend to defeat the appellee's claim of title, and was competent. *Nave v. Flack*, 90 Ind. 205; s. c., 46 Am. Rep. 205; *Harbor v. Morgan*, 4 Ind. 158.

We do not think that there was any attempt to correct a description against a subsequent purchaser, for there are two calls in the mortgage, the one correct, the other incorrect, and all that is done by the former opinion is to declare that in such a case it is proper

Whitesides v. Hunt.

to reject the incorrect and accept the correct description. The instrument of title was of record, and gave notice of the two descriptions, and thus put a purchaser upon inquiry as to the true one. It is not the case of an entirely erroneous description.

The evidence offered should have been admitted, and this is the only point here involved.

Petition overruled.

WHITESIDES V. HUNT.

(97 Ind. 191.)

Contract — for purchase of goods on margins.

A contract for the purchase of wheat, to be delivered in the future, the purchaser putting up margins, and both parties understanding that the wheat is not to be delivered, but that settlement shall be made by the payment of the difference between the market price at the day fixed for delivery and the purchase-price, is void.*

ACTION for commissions and advances. The opinion states the case. The plaintiff had judgment below.

R. M. Johnson, for appellant.

G. M. Overstreet, A. B. Hunter, H. C. Allen and L. H. Bisbee, for appellees.

FRANKLIN, C. Appellees, as commission merchants, sued appellant for commissions and money advanced in the purchase of five thousand bushels of wheat. The transaction was consummated through the Chicago Board of Trade.

The defendant answered that no wheat was actually purchased; that the transaction was a contract upon margins, and gaming upon the future price of wheat, and to be settled by paying or receiving at a future day the difference between the price of wheat then and at the date of the contract; that the advancements of margins made were to keep the payment of differences secure, and that the contract was contrary to public policy, illegal and void.

* See *Wall v. Schneider* (59 Wis. 352), 48 Am. Rep. 520.

Appellees replied by a denial. There was a trial by jury, verdict for the plaintiffs, and over a motion for a new trial, judgment was rendered upon the verdict.

[Omitting assignment of errors.]

We will consider these specifications in the inverse order of their statement. The instructions complained of read as follows:

“1. Plaintiffs claim that defendant is indebted to them in the sum of \$12.50 as commission due them as commission merchants in the purchase of five thousand bushels of wheat; also that they purchased in the city of Chicago five thousand bushels of wheat for the defendant, and by the terms of such sale the defendant was required to place in their hands a sufficient sum of money to protect and indemnify them against loss, and by reason of the decline in wheat, the sum of \$200 in the hands of plaintiffs belonging to the defendant was not a sufficient protection and indemnity to them against loss; and after notice to defendant to place in their hands a greater sum of money, they sold the wheat, which they claim the right to do, at a loss to them of \$497.50, from which deduct the sum of \$200, made a clear loss of \$297.50.

“2. The defendant insists that they purchased no wheat, nor did the plaintiffs sell him any wheat, but that in the month of February, 1882, he contracted with plaintiffs for the purchase of 5,000 bushels of wheat, to be delivered in the month of March, 1882, with the mutual understanding that no wheat was purchased or sold or would be required to be delivered, but that the transaction should be adjusted between the parties upon the bases of the market value of wheat in Chicago at the date of the pretended purchase and pretended sale (or maturity of the contract), when in fact no wheat was bought or sold. In brief, a bet or wager on the price of wheat at a given time.

“3. If defendant did purchase of plaintiffs 5,000 bushels to be delivered to him at a future date, this would be a legitimate and proper transaction, and it is competent for parties to make such contract.

“4. It is for you to determine from the evidence whether the plaintiffs were, by the nature of the contract, authorized to sell the wheat before the maturity thereof, and whether the plaintiffs should have served notice upon defendant that a further deposit of money was demanded from him to make his contract good, and if in point of fact such notice was served on defendant.

“5. If by the terms of the contract and nature of the business, the plaintiffs required of the defendant any sum of money ‘to make his deal good,’ it was the duty of plaintiffs, before they could ‘close him out,’ or sell his wheat, to notify him of such fact and give him a reasonable time to respond. Unless there was such a usage or custom in the business being transacted, and in connection with the transaction out of which the alleged indebtedness grew, of which the defendant was advised or had notice, and demand was

waived by him, then the plaintiffs, by selling the wheat before the date of delivery of the wheat or the maturity of the contract for delivery, could not sell the same and charge the defendant with the loss thereon.

“ 6. If the plaintiffs purchased the wheat for the defendant, and by reason of his failure he failed to put up further margins to protect them after ‘ a call ’ therefor, and by reason of such failure they did, to protect themselves from loss while holding such wheat for the defendant, sell the same, and a loss was incurred, and this was within their contract, and so contemplated and understood by them, then the defendant must make the loss good, and respond in damages to the extent of such loss.

“ 7. If the sum of money sued for was paid out at the request of defendant, or a liability was incurred by the plaintiffs at request of defendant, whereby they were required to pay out such sum of money upon such liability for his use and benefit, then he should refund such sum of money thus paid out.

“ 8. If it was the mutual contract of parties plaintiffs and defendant, and they so mutually understood the same, that no wheat was actually to be delivered, and that the contract was not, in fact, to be performed, and ‘ the deal ’ should be settled upon the basis of the contract and market price, then the plaintiffs cannot recover in this case. But it is not sufficient that the defendant so understood the contract or ‘ deal,’ but the plaintiffs must be a party to such contract and understanding. If it was a proper and lawful contract on their part, and entered into by them in good faith, intending to perform the same, then it is immaterial as to the private understanding of defendant.”

The class of contracts that forms the subject of this suit has become so extensive in business transactions, and has recently so often been before the courts, that we deem it advisable to give the subject a more extended investigation than usual. Trading in options, and buying what are called “ futures,” have become parts of the commercial transactions of the country.

In the case of *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep., 825, the court says: “ The complainants never buy or sell for present delivery, but always deal in futures and upon margins. Whenever the required margin is placed in the hands of complainants, they will buy or sell, as customers desire, grain, etc., at the last quotation of the Chicago Board of Trade. This is always for the next or succeeding month’s delivery, and the deal is taken by the complainants themselves. The customer must always keep his margin good, and that without notice; and if any time before the time fixed for the delivery the market in Chicago goes against the customer to the extent of his margin, the trade is closed and the complainants take the margin and the customer is not personally liable, the extent of his loss being his margin. If however the market should go in favor of the customer, he may call for a settle-

ment at any time and without regard to the maturity of his contract, and he is then paid the difference between the then market price and the price at which he bought or sold, less a sum which is called by complainants 'a commission.' This sum, which is one-fourth of a cent on each bushel of grain which is alleged to be bought or sold, is not a commission, as the complainants always take the deal themselves, and do not pretend to buy or sell to others for the account of the customer, but is really the odds which the customer gives them in the wager on the future of the market. It is perhaps true if the customer keeps his margin good, so that he cannot be closed out, and does not exercise his right to settle upon the basis of the difference in the prices of the grain, etc., he can demand a compliance with the contract and a delivery; but if the course of business between the complainants and their customers is to settle their alleged contract by a payment of the differences in the market rates, the fact that a customer may, under certain circumstances, require an actual delivery, does not relieve the complainants from the charge of carrying on a 'bucket-shop.' It is the general course of a man's business which defines and classifies it. If 'bucket-shop' means a place where wagers are made upon the fluctuations of grain and other commodities, then I think the evidence shows the complainants keep such a 'shop,' and are of the class to which defendants are prohibited from furnishing the market quotations of the Chicago Board of Trade. This is gambling, and a very pernicious and demoralizing species of gambling, which a court of equity should not protect, even if the board of trade had not taken the action it has. It is true that this kind of gambling has not yet been made criminal by the statute law of the State, still if a case of wager is made out, none of the State courts will enforce such contracts. *Sawyer v. Taggart*, 14 Bush, 727. Gambling on the fluctuation in the market prices of stocks, grains, etc., is against the public policy of the State, though it may not be a crime punishable by fine or imprisonment."

It was formerly held that when the vendor had neither the goods nor entertained any contract to buy them, at the time of the sale, nor had any reasonable expectation of receiving them by consignment, but intended to go into the market and buy the articles he engaged to deliver, no action could be maintained on such contract. But that rule has been changed by the later authorities, and there have been numerous decisions, particularly in this country, holding that the vendor may contract for the sale of an article not in his possession, and this doctrine seems to be entirely in accordance with the rules of public policy. *Bryan v. Lewis*, Ry. & Moody, 386, and note *a*; *Wolcott v. Heath*, 78 Ill. 433; *Brua's Appeal*, 55 Penn. St. 294; *Brown v. Hall*, 5 Lans. 177; *Noyes v. Spaulding*, 27 Vt. 420; *Hibblewhite v. McMorine*, 5 M. & W. 462; *Kingsbury v. Kirwin*, 43 N. Y. Super. Ct. 451; *Pixley v. Boynton*, 79 Ill. 351; *Rumsey v. Berry*, 65 Me. 570; *Disborough v. Neilson*, 3 Johns. Cas.

Whitesides v. Hunt.

81; *Cassard v. Hinman*, 1 Bosw. 207; *Ashton v. Dakin*, 4 H. & N. 867; *Chapman v. Campbell*, 13 Gratt. 105; *Cole v. Milmine*, 88 Ill. 349; *Logan v. Musick*, 81 id. 415; *Gregory v. Wendell*, 39 Mich. 337; s. c., 33 Am. Rep. 390.

In the last case cited, the court says: "The mercantile business of the present day could no longer be successfully carried on if merchants and dealers were unable to purchase that which as to them had no actual or potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy; and it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time."

There is a difference, and a distinction must be made, between a contract where there is a *bona fide* intent to fulfill the agreement according to its terms, and those where the difference in the market price is to be paid.

There can be no doubt but that sales of a commodity to be delivered at some other time are valid, but if the parties agree at the time of making the contract that no title to any property shall pass or any delivery be made, or when, from the nature of the contract it must be apparent that the intent of the parties was such that at some future specified time the losing party should pay to the other the difference between the selling price at that time and the time of making the contract, it would be a contract which the law would refuse to enforce, for the reason that it is clearly a wager upon the price of the commodity at some future day. *Yerkes v. Salomon*, 11 Hun, 471; *Grizewood v. Blane*, 11 C. B. 526; *Story v. Salomon*, 71 N. Y. 420; *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 id. 33; s. c., 25 Am. Rep. 349; *Bigelow v. Benedict*, 70 N. Y. 202; s. c., 26 Am. Rep. 573; *Maxton v. Gheen*, 75 Penn. St. 166; *Peabody v. Speyers*, 56 N. Y. 230; *Williams v. Tiedemann*, 6 Mo. App. 299; *Sampson v. Shaw*, 101 Mass. 145; s. c., 3 Am. Rep. 327; *Kirkpatrick v. Bonsall*, 72 Penn. St. 155; *Clarke v. Foss*, 7 Biss. 540; *Rudolf v. Winters*, 7 Neb. 125; *Waterman v. Buckland*, 1 Mo. App. 45; *In re Green*, 7 Biss. 338; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Beveridge v. Hewit*, 8 Brad. 467; *Enderby v. Gilpin*, 5 Moore, 571; *Swartz's Appeal*, 3 Brewst. 131; *Barnard v. Backhaus*, 52 Wis. 593; *Everingham v. Meighan*, 55 Wis. 354; *Cameron v. Durkheim*, 55 N. Y. 425.

In the case of *Rumsey v. Berry*, *supra*, the court very clearly defines the line which separates the two classes of contracts, the legal from the illegal. In that case it was said: "A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market

price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure."

In the case of *Kent v. Millenberger*, 13 Mo. App. 503, in the opinion by THOMPSON, J., it was held that where by the terms of the contract, the commodity, at the maturity of the contract, may be required to be delivered, or damages recovered for the breach, unless a delivery is waived by the opposite party, the contract will be held to be legal, unless there is an express agreement made, at the time of the contract, that the property should not be delivered, and that such an agreement, subsequently made, would not vitiate the contract.

In the case of *Cobb v. Prell*, 15 Fed. Rep. 77, in the opinion by MCCRARY, J., it was held that the fact that the intention of the parties to a contract of the sale of commodities for future delivery is, that there shall be no actual delivery, but that the transaction shall be settled by the payment of the difference between the selling and market price, will render such contract void, and that all the circumstances and acts of the parties may be considered in determining their intention. We think this case the better authority. A contract to sell a commodity for future delivery, coupled with an express agreement made at the time, that the commodity, at the maturity of the contract, shall not be paid for or delivered, but shall be settled for by difference on prices, is no contract of sale at all. And well may the learned court in that case admit that such a contract is illegal and void.

The trouble arises where, at the date of the contract, there is no express agreement as to payment and delivery, and where those questions are to be settled by implication, based upon the understanding and intention of the parties.

In the case of *Union Nat'l Bank v. Car*, 15 Fed. Rep. 438, it was held, that "The validity of option contracts depends upon the mutual intention of the parties. If it is not the intention in making the contract, that any property shall be delivered or paid for, but that the fictitious sale shall be settled on differences, the contract is illegal. But if it is the *bona fide* intention of the seller to deliver, or the buyer to pay, and the option consists merely in the time of delivery within a given time, the contract is valid, and the putting up of margins to cover losses which may accrue from the fluctuations of prices, etc., is legitimate and proper."

In the case of *Justh v. Holliday*, 2 Mackey (D. C.), 246, it was held: "Where a contract is made for the delivery or acceptance of securities at a future day, at a price named, and neither party at the time of making the contract intends to deliver them or accept them, but merely to pay differences, according to the rise or fall of the market, the contract is a gambling one and is void as contrary to public policy. The indorser of a promissory note, given on account of such dealings as are recognized as gambling transactions,

Whitesides v. Hunt.

can rely upon their illegality as a defense to an action on the note. In an action to recover money where the defense set up is that the contract was a stock gambling one, the real question for determination is the *bona fides* of the transaction. It is not the form but the intent with which the scheme was planned. If neither party contemplates that there should be a delivery of the stock, but merely to pay differences according to the rise or fall of the market, the contract is a gambling one."

In the case of *Cunningham v. National Bank of Augusta*, 17 Cent. L. J. 470, it was said: "It is manifest that the consideration of the note sued on is for and on account of dealings commonly called futures. Is such a transaction in the nature of gaming? If so then the note was void at the time it was given; and no subsequent transfer could revive or give vitality or any legal validity to a contract thus tainted and poisoned at its birth. * * The plea expressly alleges the transaction to be 'a wagering and gaming contract.' But what is the transaction termed futures? It is this: One person says, 'I will sell you cotton, at a certain time in the future, for a certain price; you agree to pay that price, knowing that the person with whom you have to deal has no cotton to deliver at the time; but with the understanding that when the time for delivery arrives, you are to pay me the difference between the market value of the cotton and the price you agreed to pay, if cotton declines; and if cotton advances, I am to pay you the difference between what you promised to give and the advanced market price.' If this is not a speculation on chances, a wagering and betting between the parties, then we are unable to understand the transaction. A betting on a game of faro, brag or poker cannot be more hazardous, dangerous or uncertain. * * * What are some of the consequences of these speculations on 'futures'? The 'faithful chroniclers of the day' have informed us that as growing directly out of these nefarious practices, there have been bankruptcies, defalcations of public offices, embezzlements, forgeries, larcenies and deaths. Certainly, no one will contend for one moment, that a transaction fraught with such evil consequences is not immoral, illegal and contrary to public policy."

In the case of *Rudolf v. Winters*, 7 Neb. 126, the Supreme Court of that State held, that "A contract to operate in grain options, to be adjusted according to the differences in the market value thereof, is a contract for a gambling transaction which the law will not tolerate. It is *contra bonos mores*, and against public policy." And a number of the heretofore cited authorities, with others, are referred to in support thereof.

In the case of *Lyon v. Culbertson*, 83 Ill. 33; s. c., 25 Am. Rep. 349, the following language is used: "The fact that no wheat was offered or demanded shows, we think, that neither party expected the delivery of any wheat, but in case of default in keeping margins good, or even at the time for delivery, they only expected

Whitesides v. Hunt.

to settle the contract on the basis of differences, without either performing or offering to perform his part of the agreement; and if this was the agreement, it was only gaming on the price of wheat, and if such gambling transactions shall be permitted, it must eventually lead to what are called 'corners,' which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain, as well as the producer, and are pernicious and highly demoralizing to the trade. A contract, to be thus settled, is no more than a bet on the price of grain during or at the end of a limited period. If the one party is not to deliver or the other to receive the grain, it is, in all but name, a gambling on the price of the commodity, and the change of names never changes the quality or nature of things. * * * This seems to be a subtle invention to abrogate well established, fair and just principles of the law of contracts, and not only so, but to the great injury of fair and legitimate trade."

In the case of *Brua's Appeal*, 55 Penn. St. 294, it was said: "Any thing which induces men to risk their money or property, without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community, no matter by what name it may be called. It is the same whether the promise be to pay on the color of a card, or the fleetness of a horse, and the same numerals indicate how much is lost and won in either case, and the losing party has received just as much for the money parted with in the one case as the other, viz.: nothing at all. The lucky winner, of course, is the gainer, and he will continue so until fickle fortune in due time makes him feel the woes he has inflicted on others. All gambling is immoral. I apprehend that the losses incident to the practice disclosed * * * have contributed more to the failures and embezzlements by public officers, clerks, agents and others acting in fiduciary relations, public and private, than any other known, or perhaps all other causes. * * * In the train of its evils, there is a vast amount of misery and suffering by persons entirely guiltless of any participation in the cause of it."

We conclude from the foregoing authorities, that in this class of cases, the correct rule is, that where a commodity is bought for future delivery, no matter what the form of the contract is, the law regards the substance and not the shadow, and if the parties mutually understood and intended that the purchaser should pay

Fickle v. Snepp.

for and the seller should deliver the commodity at the maturity of the contract, it is a legal and valid transaction, and the fact that the purchaser is required to deposit a margin, and increase the same at any time the market requires it, in order to secure the payment at maturity, or that the seller shall deposit a margin and increase the same like the purchaser in order to secure the delivery at maturity, does not vitiate the contract. But if at the time of the contract it is mutually understood and intended by all the parties, whether expressed or not, that the commodity said to be sold was not to be paid for, nor to be delivered, but that the contract was to be settled and adjusted by the payment of difference in price; if the price should decline, the purchaser paying the difference; if it should rise, the seller paying the advance, the contract price being the basis upon which to calculate differences—in such case, it would be a gambling contract, and void, and the deposits of margins are only to be considered as attempting to secure the terms of the bet on prices at some future time.

[Omitting other points.]

PER CURIAM. It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

FICKLE V. SNEPP.

(97 Ind. 239.)

Will — notes as part of.

Notes made by a testator, payable at his death, folded up with his will, referred to and clearly identified therein, and remaining in his possession at his death, are a part of the will. (See note, p. 454.)

ACTION to enforce a legacy. The opinion states the case. The plaintiff had judgment below.

N. B. Berryman, R. W. Wiles, T. B. Adams and L. T. Michener, for appellants.

B. F. Love, A. Major and H. C. Morrison, for appellee.

ELLIOTT, C. J. The complaint of the appellee was filed against the administrator with the will annexed, of the estate of John Snepp, deceased, and seeks to enforce payment of a legacy alleged to have been bequeathed to the claimant.

A note is set forth in the complaint, signed by the testator, and containing, among others, the following provision: "On the day of my death I promise to pay Joseph H. Snepp seventeen hundred dollars." This note was one of a series of five, signed by the testator, and made payable to his children. They were folded up with the will and were in the testator's possession at the time of his death. It is averred that "a will was duly executed and probated," and that "in item first of said will the said testator did direct that his executors should pay all of his just debts, including whatever might be due for principal and interest upon five notes which he had at the time of the execution of the will made to five of his children, to-wit, his daughter Elizabeth, his daughter Maria, his sons William M., Joseph H. and David J. Snepp, for the purpose of making all his children equal in their advancements out of his estate." In the will, which is made part of the complaint, is the following:

"Item 1st. I direct that all of my just debts, including whatever may be due for principal and interest upon five notes, which I have this day made to five of my children, viz., Elizabeth, Maria, William M., Joseph H. and David J., for the purpose of making all my children equal in their advancements out of my estate, which said notes are payable at my death."

Following this is a provision for the payment of funeral expenses and for the sale of property, and then comes this provision: "I direct that the residue of my estate, which shall then remain in the hands of my executors, shall be equally divided among my children, viz.: Elizabeth Hoskins, Maria Runshe, May J. Fickle, William M. Snepp and David J. Snepp, share and share alike, provided that if I shall at any time hereafter have to pay any money for any of my sons-in-law by reason of my liability therefor, the same shall be taken as part of the share in my estate of such daughter for whose husband I shall pay the same; and provided also, that if any of my said children shall die before I do, then the share of such deceased child shall be paid to their legal heirs, issue of their bodies."

Following the signature of the testator and the attestation clause

Fickle v. Snepp.

is a list of notes and amounts, to which is appended the following statement, signed by one of the subscribing witnesses: "The above is a statement of the notes made by John Snepp to five children for sums of money to make them all equal in advancement with May J. Fickle."

The schedule signed by the witness cannot be regarded as part of the will. It is not in any way identified; there is not the slightest reference to it in any part of the instrument. It is true that schedules or other papers may be considered in connection with the will when they are plainly identified, but there is here no identification, either in express words or by fair implication; hence the paper cannot be deemed part of the will. 1 Jar. Wills (5th Am. ed.), 37, 38, auth. n.; 1 Redf. Wills, 261, 262. We applied in *Pulse v. Miller*, 81 Ind. 190, the general principle which governs here to contracts, and the reason for its application to wills is stronger than that which operates in cases of contracts.

The notes which the testator signed at the time he executed the will are clearly and fully identified. There cannot be the slightest doubt as to their identity. They are therefore to be regarded as a part of the will. This question was examined with great care and discussed with much ability in *Newton v. Seaman's Friend Society*, 130 Mass. 91; s. c., 39 Am. Rep. 433. In that case it was said by GRAY, C. J., in delivering the opinion of the court: "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such." The case from which we have quoted is also reported in 2 Am. Prob. Cases, 18, and copious notes are added giving many valuable cases. These authorities so fully settle the question that a discussion would be profitless. And we content ourselves with adding to the cases cited by the reporters the case of *Fosselman v. Elder*, 98 Penn. St. 159, and our own case of *Fesler v. Simpson*, 58 Ind. 83.

The appellant's counsel argue the case on the theory, that as the notes were not delivered, they were not in existence. This is a fundamental error. The notes as papers, as instruments of writ-

ing, were in existence, and as such they were fully identified by the will. It was not necessary that the notes should have been made effective by delivery; had that been so, there would have been no necessity for any will; the notes would have been in themselves effective without a will. The question is not whether the notes existed as valid promises to pay money, but whether they were in existence as papers or instruments capable of identification and capable of forming, by way of reference, part of the will of the testator. It matters not, as all the cases show, whether the paper did or did not create a binding obligation. If it had an existence as a writing and was of such a character as that it could be incorporated in the will, then the requirements of the law are satisfied. This is the rule declared in *Fesler v. Simpson*, *supra*.

In a supplemental brief counsel for appellant argue that it is not shown that the administrator had money in his hands sufficient to pay the legacy, and that for this reason the complaint is bad. The complaint does aver that "there is now in the hands of the administrator the sum of \$—— belonging to said estate, that the whole amount of said note is unpaid, and that by reason of the premises, and under the provisions of the will, he is entitled to have allowed him by said administrator, and to be paid out of the estate, the sum of \$2,712.86." We think that in view of the liberal rules of pleading that obtain in claims against estates, and in view of the rule that the remedy for uncertainty is by motion, the complaint must be upheld against an attack by demurrer. The practice of leaving blanks in a pleading is not a commendable one; on the contrary, it is one which good pleaders abhor. But we do not think it necessary for the claimant to show that there are assets sufficient to pay his claim before he can obtain an allowance. It is one thing to obtain an allowance and another thing to obtain a direction for the payment of the claim.

Claims may be allowed without inquiring whether there are assets sufficient to pay them, or whether there are or are not members of a preferred class. The allowance comes first; the direction as to payment comes afterward. The statute fixes the order of priority of claims, and this the courts cannot change. *Jenkins v. Jenkins*, 63 Ind. 120. All that a complaint need do is to state facts showing a right to an allowance; it need not anticipate defenses, nor show the existence of assets.

The English rule is that a legacy cannot be recovered in an ac-

Fickle v. Snapp.

tion at law, but may be enforced by a suit in equity. The American cases are not harmonious, but there are very many in favor of the rule that an action at law will lie for the collection of the legacy. 3 Williams Ex. (6th Am. ed.) 2046, auth. n. Under our statute it cannot be important to inquire whether the remedy is at law or in equity, for if facts are stated warranting a recovery, a recovery will be awarded, no matter whether the case made is cognizable in equity or at law. The object of our statute governing the settlement of decedents' estates is to keep all matters concerning the estate in the court having probate jurisdiction, and we think it was proper to institute this proceeding in the court of probate jurisdiction and to give it the form of a claim against the estate.

We are referred to the cases of *Crist v. Crist*, 1 Ind. 570; *Highnote v. White*, 67 id. 596, and *Gould v. Steyer*, 75 id. 50, as sustaining appellant's contention. The two cases first named were the recovery of specific things, and the rule applicable in such cases is very different from that which prevails where all that is sought is to establish a claim to a legacy by having it allowed. *Branch v. Holcraft*, 14 Ind. 237, and *Rapp v. Matthias*, 35 id. 332, cited in *Highnote v. White*, *supra*, do not touch the question here under discussion. In *Gould v. Steyer*, *supra*, the action was not against the administrator, but against the legatees, and the language used in the opinion is applicable to such a case as that, but not to a case like this. The reason that *Gould v. Steyer*, *supra*, is well decided, is that as long as the matters of the estate are unsettled, the administrator, and not the heirs or legatees, must sue, and this is what is decided in *Fillingin v. Wylie*, 3 Ind. 163. The language in *Gould v. Steyer*, *supra*, must be limited to the facts of that case. We do not find any case warranting the conclusion that a legatee is bound to aver that the administrator has assets, or that he is in all cases bound to wait until the estate is finally settled and the administrator discharged before he can have the amount of the legacy established by an order of allowance, and we are satisfied that there is no reason for such a conclusion. The cases cited by the appellants all agree that it is the duty of the administrator to pay the legacy; and if this be true, it would seem clear that this duty should be performed while the representative capacity existed.

There is a defect in the complaint which compels a reversal. The will fixes the right to the legacy, and makes it the duty of the

Fickle v. Snepp.

administrator to pay it. *Heady v. State*, 60 Ind. 316, 323. But he is not bound to pay it until all debts of the estate have been paid. Story Eq., § 555. He may therefore rightfully delay payment, and in doing this does no wrong, and if he does no wrong then he is not liable to an action. We suppose no one doubts that before an action of any character can be maintained, it must appear that the defendant was in the wrong. In this case it does not appear that there was any denial of the appellee's claim; for aught that appears the administrator may have fully conceded its validity. The complaint should show in such a case as this that the legatee's claim was denied by the administrator. It is upon this principle that the cases rest which hold that a demand must precede the action. 3 Wait Act. and Def. 260; 3 Williams Ex. (6th Am. ed.) 2046, auth. n. A complaint which does not show a payment of all debts must show in some form, that there is reason for appealing to the court to establish the legacy, and must also show that there is some wrong on the part of the administrator. For the defect in the complaint pointed out by us the judgment is reversed.

Judgment reversed.

NOTE BY THE REPORTER.— See *Gerrish v. Gerrish*, 8 Oreg. 351; s. c., 34 Am. Rep. 585. In *Banker's Appeal*, Pennsylvania Supreme Court, Oct., 1884, a will contained a legacy on the third page, to David S. Baker, which was erased, with the reference, "see next page." The will was signed at the bottom of the third page. On the next page was the substituted provision for David S. Baker, with some others. The court observed: "The will of George Baker is commenced upon the first, and is formally concluded upon the third page of a folio of foolscap paper. The fourth page of the paper however contains another, and further testamentary provision, and as the signature to the will is at the end of what is written on the third page, it is urged, on the one side, that it is not signed, according to the statutory requirement, at the end thereof; on the other side it is contended that what is written on the fourth page is, by clear reference, incorporated into the body of the will, and that although the signature is not at the end of the writing, in point of space, yet if the item on the fourth page be drawn into its appropriate and clearly intended connection, on the third page, the signature will then appear at the end of the will in point of fact.

"It will not, we think, be seriously questioned, notwithstanding the provisions of the act of 1833, that any relevant paper or writing attached or detached, if there be no reasonable question as to its identity, or of its existence at the execution of a will, may be so referred to therein as thereby to become incorporated with its provisions. No case in Pennsylvania has been cited by counsel, with the exception perhaps of *Hauberger v. Root*, 6 W. & S. 431, in which this rule is expressly asserted; nor in the somewhat hasty search we

Fickle v. Snapp.

have made, do we find any in which the precise point is presented; but in England, and in the courts of some of the States, under similar statutes, the doctrine is distinctly declared.

“ In *Habergham v. Vincent*, 2 Vesey, Jr., 228, which was a case decided under the statute of frauds, WILSON, J., sitting with Lord Chancellor LOUGHBOROUGH, says: ‘ I believe it is true, and I have found no case to the contrary, that if a testator in his will refer expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will; and such reference is the same, as if he had incorporated it, because words of relation have a stronger operation than any other.’ This case was followed *In re Countess of Durham*, 3 Curtis, 57, and in many other cases, both in the civil and ecclesiastical courts of England, and it cannot be doubted that such was the rule in the authentication and probate of wills, under the statute of frauds. By the statutes of 7 Will. IV. and 1 Vict., c. 26, however all previous provisions as to execution and attestation of wills were repealed, and it was thereby enacted that no will should be valid, unless in writing and executed as therein provided, and one of the requisites was that it should be signed, at the foot or end thereof, by the testator or by some other person in his presence and by his direction. In *Willis v. Lowe*, 5 Notes of Cases, 428, and in *Smee v. Bryer*, 6 Moore P. C. C. 404, however it was held that the signature must be so affixed at the end of the will as to leave no blank space for any interpolation between the end of the will and the signature. This was found to produce such extensive injustice that by the statute 15 and 16 Vict., c. 24, the legislature interfered to alter the law so established; but in this amendatory statute it is expressly provided that no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor to any disposition or direction, inserted after the signature shall be made. Upon these provisions of the statute law of England, the case of *Allen v. Maddock*, 11 Moore P. C. C. 426, was decided. In that case after an extended reference to all the English authorities, and a full discussion of the subject, it was held that an unattested paper, which would have been incorporated in an attested will or codicil, executed according to the statute of frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of the Wills Act, 1 Vict., c. 26; that where there is a reference, in a duly executed testamentary instrument, to another testamentary instrument, imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence as to its identity, and such parol evidence is not excluded by the statute 1 Vict., c. 26. The judgment in *Allen v. Maddock*, was delivered by Lord KINGSDOWN, who says: ‘ It was not contended in this case, nor so far as we are aware, has it been contended in any case, since the Wills Act of 1837 (1 Vict.), that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a will or codicil; but the question has always been, what reference in the valid paper is sufficient to let in evidence to identify the invalid.’ The doctrine declared in *Allen v. Maddock*, has not, we believe, in any respect been modified, changed or doubted. It is followed

Fickle v. Snepp.

in many subsequent cases, and is frequently referred to as containing a clear and elaborate exposition of the law on the subject. *In re Almosinio*, 6 Jur. (N. S.) 802; 1 Sw. & Tr. 508; *In re White*, 30 L. J. 55; *In re Birt*, 24 L. T. R. 142.

“In New York the Revised Statutes, *inter alia*, required that every last will and testament of real or personal property should be subscribed by the testator, at the end thereof. In *Tonnele v. Hall*, 4 Comst. 140, a will was written on several annexed sheets of paper, and was duly executed; a copy of a map was upon the last of the sheets composing the instrument; it was referred to in the will as being annexed, and for the description and designation of the several lots devised, but it was not signed by the testator nor attested by the witnesses. The Court of Appeals held that where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper makes part of the will, although it be not subscribed or even attached. It was contended in the argument of counsel in that case, that such a sheet annexed must be considered at the beginning or the end of the instrument merely in reference to its local annexation, without regard to the contents of the writing to which it is annexed; but JEWETT, J., delivering the opinion of the court, says: ‘I cannot agree that such a circumstance can have the effect to constitute the paper referred to, the beginning or end of any instrument, in the body of which reference is made to it or its contents, whether annexed in fact or not. If the map on file in the register’s office or a reduced copy of it annexed may be treated as a part of the instrument, and I think it may (*Habergham v. Vincent*, 2 Vesey, Jr., 228; *Bond v. Seawell*, 3 Burr. 1775; *Wilkinson v. Adam*, 1 Vesey & Beame, 445), its contents must be incorporated and distributed in it to the extent of the several references made to it, at the places where made, and thus the contents of the paper to which the instrument refers will be deemed constructively inserted before the point is reached where the subscription by the decedent and signing by witnesses are made.’ We may also refer to similar rulings upon the same point, in *Loring v. Sumner*, 23 Pick. 98; *Wilbar v. Smith*, 5 Allen, 194; *Johnson v. Clarkson*, 3 Rich. Eq. 305; *Chambers v. McDaniel*, 6 Ired. 226; *Phelps v. Robbins*, 40 Conn. 250; *Crosby v. Mason*, 32 id. 482.

“Mr. Redfield, in his treatise on the Law of Wills, page 264, after a discussion of the authorities, English and American, says: ‘The cases already referred to show very clearly that a will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may nevertheless adopt an existing paper by reference; and this is true of others, soon to be referred to, many of which were decided during the existence of statutes requiring such formalities; so that we cannot escape from the force of these cases by supposing they had reference exclusively to wills of personal estate, when no particular formalities were required under the earlier English statutes.’

“In our own State we find no case at variance with the doctrine of the cases stated. The rulings of this court on questions similar in effect and preliminary in their nature to that under consideration, have in every instance, been in conformity with the views here expressed. In *Ginder v. Farnum*, 10 Penn. St.

Fickle v. Snepp.

98, it was held that where a will is written on several sheets of paper fastened together with a string, proof by two witnesses of the signature of the testator at the end thereof is sufficient; that it is the signature, not the *factum* or body of the will which is to be established by two witnesses, and whether there has been any subsequent or fraudulent interpolation is for the jury, to be determined as other cases. In *Wikoff's Appeal*, 15 Penn. St. 281, following the *Earl of Essex's* case, 1 Show. 69, it was held that a will may be made on distinct pieces of paper; that it is sufficient if they are connected by their internal sense, and that even if there be some confusion in the order of their arrangement when fastened together, they are to be read according to their coherence or adaptation of parts. In *Fosselman v. Elder*, 98 Penn. St. 159, it was held that where the name and designation of the beneficial party was written, not in the body of the codicil, but upon the face of an envelope in which it was found, the inscription on the envelope should be read as a preface to and in connection with the paper inclosed therein, and that they together constituted a valid testamentary disposition.

“Thus the general principle has been clearly established, that a will is to be read in such order of pages or paragraphs as the testator manifestly intended, and the coherence and adaptation of the parts clearly required. In writing a will upon the pages of foolscap paper a testator may or may not conform to the order of the consecutive pages of the folio; there is no law which binds him in this respect. He may begin upon the fourth page of the folio and conclude upon the first, or he may commence upon the first, continue upon the third, and conclude upon the second. In whatever order of pages it may be written, however, it is to be read, as in *Wikoff's Appeal*, according to the internal sense and the coherence or adaptation of parts. The order of connection however must manifestly appear upon the face of the will, it cannot be established by extrinsic proof. Whilst therefore the end of the writing in point of space may in most cases be taken as the end of the disposition, it does not follow that in all cases the signature must of necessity be there written, if it be written at the end of the will, according to such connection and arrangement of the pages or sheets as the obviously inherent sense of the instrument requires.

“Where however the continuity of a writing, otherwise complete, is attempted to be broken by the insertion into it of a clause or paragraph written upon the same or a different page or sheet, the clause to be inserted must be plainly referred to, and be susceptible, also of certain identification. The reference must, as we have already shown, be complete in the body of the will. The testator's intention cannot otherwise appear; it cannot appear by extrinsic proof; but the identification of that which is sought to be inserted, in the nature of the case, may be the subject of extraneous proof.”

ELTERSON V. LEEDS.

(97 Ind. 336.)

Partnership — use of firm name by purchaser — liability of former member.

Where one who has carried on business alone, under a firm name, sells the business to his son, who continues the business under the same name, the former is liable for goods purchased by the latter from an actual dealer with the former, who has no knowledge or notice of the transfer.

ACTION for goods sold and delivered. The opinion states the case. The defendant had judgment below.

C. E. Shively and T. J. Study, for appellants.

H. U. Johnson, G. S. Needham and R. A. Jackson, for appellees.

BEST, C. This action was brought by the appellants to recover the price of goods sold and delivered. A separate demurrer to the complaint by each appellee was sustained, and this ruling is assigned as error.

The complaint alleges, in substance, that the plaintiffs are, and for five years have been, partners at New Brighton, in the State of Pennsylvania, engaged in manufacturing and selling rose-pots, and other wares, such as are commonly used in green-houses; that from the year 1878 until the first day of June, 1882, the said Hannah A. Leeds owned and carried on in the city of Richmond, in this State, a green-house, and was during that time, and at that place, engaged in raising and cultivating flowers for sale in connection with said green-house; that said Hannah conducted and carried on said business under the name of "Leeds & Co.," and while she carried on said business under said name, she purchased of the plaintiffs, by such name, at divers times, large quantities of rose-pots and other wares manufactured by them, to be used by her in said business; that said goods were ordered by her in such name, and were thus sold and shipped to her; that at the time such purchases were made, the plaintiffs knew that said Hannah either owned said green-house, and was carrying on said business upon her own responsibility, or was interested therein, and was responsible for all goods purchased under the name of "Leeds & Co.;" "that on or about

Elterson v. Leeds.

the 1st day of June, 1882, said Hannah A. Leeds sold, assigned and transferred to William B. Leeds, who is her son, her entire interest in said green-house business, property, goods and wares used in connection therewith, without any notice to the plaintiffs or knowledge on their part of such sale, assignment and transfer," and that said "William B. Leeds immediately thereafter continued and carried on upon, and in the same premises, said business in and under the said name of 'Leeds & Co.,' with the knowledge and consent and approval of said Hannah A. Leeds," who "knew that William B. Leeds was ordering and purchasing goods and wares under and in said name of 'Leeds & Co.,' for the purpose of carrying on said business," and who suffered him to carry on said business under the name of "Leeds & Co.," without any objection upon her part; that after said William B. Leeds became the owner of said green-house, and while he was carrying on said business in the name of "Leeds & Co.," and before the plaintiff had any knowledge whatever that said Hannah A. Leeds had sold and transferred said green-house and business to said William B. Leeds, the latter, in the name of "Leeds & Co.," ordered of the plaintiffs, on the 14th day of November, 1882, 62,300 rose-pots, and on the 5th day of December, 1882, 33,700 more, all of the value of \$475; that the plaintiffs, from their place of business at New Brighton, shipped said goods to "Leeds & Co.," at Richmond, in this State, where the same were received by said William B. Leeds and used by him in said business; that at the time said goods were shipped the plaintiffs believed that said Hannah A. Leeds was still the owner of said property, and was carrying on said business under such name, or was interested therein, and was liable for all goods purchased under said name; that said William B. Leeds is insolvent, and that said sum is due and remains wholly unpaid. Wherefore, etc.

The appellee's counsel do not pretend that this complaint was not sufficient against William B. Leeds. He ordered the goods, they were shipped to him, received and used by him, and of course he is liable for them. The demurrer by him should therefore have been overruled.

The real dispute is whether Hannah A. Leeds is also liable. The appellants insist, that under the circumstances stated, it was her duty to notify them that she had ceased to do business under the name "Leeds & Co.," and that her failure to do so renders her liable for the goods in question. This the appellees' counsel dispute.

They insist that since she and her son were not partners, and the relation of principal and agent did not in fact exist between them, she was under no obligation to notify the appellants that she had ceased to do business, and as she did not buy the goods she is not liable to pay for them. The facts averred do not show that the son was either the partner or the agent of the mother, and if the rule requiring a partner on retiring from the firm, or a principal upon the termination of an agency, to give notice of such change, rests alone upon the fact of such previous relation, it cannot apply to this case, for no such relation appears to have existed. The rule however does not rest exclusively upon such relation, nor has it been thus limited. It has frequently been applied to persons who in fact sustained no such relation. For instance, to persons who have held themselves out as partners, and to persons who have held others out as their agents. In such cases it has been uniformly applied, and the fact of such relation has not been deemed essential to create liability. Indeed the rule does not rest upon such prerequisite, but rather upon the fact that since third parties have been led to believe that a certain condition of things existed, and have extended their credit upon the faith of such assurances, the party making them shall be bound by them. This rule is generally applied to a retiring partner, not because the former relation existed, nor because the remaining member had in fact any authority to bind him, but because third parties, who extend credit upon the faith of such assurance as grows out of the actual or assumed relation, have no notice to the contrary, and to permit him to escape liability would enable him to perpetrate a fraud upon such persons. The consequences that would probably result from the adoption of a different rule is the basis of this one, and we perceive no reason why it should not extend to every case where the conditions and consequences are substantially the same.

A retiring partner sustains no relation to the remaining members that actually authorizes them to bind him; neither did the mother to the son. Such members continue the business in the same name, and so did the son. In these respects the cases are precisely alike. The only difference is that the partner sells a portion, and permits the business to continue, while the mother sells the whole and permits the business to continue. What possible difference can it make to third parties without notice whether the mother sells a part or the whole, or whether she retires as a

Elterson v. Leeds.

partner or sells as owner. In either case the consequences are the same, and we can perceive no reason why she should be liable in one case and not in the other. Third parties are just as likely to lend their credit, and just as liable to be defrauded as though she were a retiring partner; indeed from a third party's standpoint she appears as nothing less. She engages in business under a firm name which imports a partnership, and the business continues under such name, without any notice that she has ceased her connection with it. Why should she not be treated like such partner, and held to the same obligations. The same reasons certainly exist, and as the same consequences may follow, we think the same rules should apply.

In addition to this, we are satisfied that the use of the name by the son, with the mother's "knowledge, consent and approval," renders her liable to the appellants. The facts averred show that under this name she did business with the appellants, and that they knew that she was "Leeds & Co.," or was liable for the debts thus contracted under that name. The act of doing business under that name was an unequivocal representation to the appellants that she was "Leeds & Co.," or was liable for debts thus contracted, and the adoption of such name, and the act of doing business with the appellants under it, were if no one else was represented by the name, tantamount to an assurance that "Leeds & Co." was in fact Hannah A. Leeds, the son could not thereafter contract with the appellants under such name while they remained in ignorance of the facts, without such act operating as a continued assurance that Hannah A. Leeds was still doing business under the name of "Leeds & Co." When therefore the son did business under such name with the appellants, he was continually representing to them that his mother was still doing business under such name, and as the business was done under such name, with the "knowledge, consent and approval" of his mother, it necessarily follows that she permitted him to thus hold her out as doing business under such name. This would of course render her liable to the appellants.

We have not been cited to, nor have found any case directly in point. There are many however quite analogous. Where a firm dissolves, and the retiring partner permits the continued use of his name, he will be held liable for debts thereafter contracted in favor of those who were ignorant of the facts, though notice of dissolution was given. Collyer Part., § 538; 1 Lindley Part. 440; *Free-*

O'Donovan v. Chatard.

man v. Falconer, 44 N. Y. Sup. Ct. (12 J. & S.) 132; *Speer v. Bishop*, 24 Ohio St. 598.

In such case, after dissolution and after notice, the remaining members of the firm sustain no relation to the retiring partner that will enable them to bind him either among themselves or in favor of third parties. Under such circumstances the remaining members possess no more power to bind the retiring partner than the son possessed to bind the mother in this case; but if such partner permits the use of his name he will be bound as though he was in fact a partner. The same principle seems to apply to this case. If the appellants were authorized to regard the name of "Leeds & Co." as the name under which Hannah A. Leeds did business, then the use of such name by the son, with her "knowledge, consent and approval," will bind her as though she was in fact doing business under such name.

It is said however that she could not prevent the use of such name. If this were conceded it is no answer to the averment that he used the name with her "knowledge, consent and approval." If thus done, it was used by her permission. We think the facts stated also render her liable, and that the court erred in sustaining the demurrer filed by her. The judgment should therefore be reversed.

PER CURIAM. It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the costs of the appellees, with instructions to overrule the demurrer filed by each of the appellees.

Judgment reversed.

O'DONOVAN V. CHATARD.

(97 Ind. 431.)

Religious society — bishop removing priest.

No action lies by a Catholic priest against his bishop for removing him from his office.*

ACTION of damages. The opinion states the case. The defendant had judgment below.

* See *Tuigg v. Sheenan* (101 Penn. St. 868), 47 Am. Rep. 727, *ante*, 186.

O'Donovan v. Chatard.

R. Hill and J. W. Nichol, for appellant.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and E. Daniels, for appellee.

FRANKLIN, C. Appellant brought this action against appellee to recover damages, alleging in his complaint, as a cause therefor, that appellee, as bishop in the Catholic church of the proper diocese, had, without jurisdiction and without just cause or provocation, removed appellant as priest in said church at Brownsburg, Hendricks county, Indiana.

On motion of appellee parts of the complaint were stricken out, and then a demurrer was sustained to the remainder of the complaint, and judgment was rendered for appellee. On appeal to the General Term of the court, the judgment of the Special Term was affirmed.

The question presented by counsel in this court is, can a priest in the Catholic church maintain an action in the civil courts against the bishop for simply removing him from office ?

Appellant, in his belief, says: "Had appellant been charged with heresy in faith or practice, or the violation of any rule of the Catholic church, under well-settled rules civil courts would not have heard his complaint, but would have remitted him to his church judicatories, reminding him that when he became a priest in the Catholic church he had agreed to submit such controversies to the decision of these tribunals."

This being true, can the priest raise an issue with his bishop, and submit to the civil courts, whether the action of the bishop in matters of discipline and church government was right or wrong, reasonable or unreasonable, wise or unwise, and have the opinion of a jury upon that subject ?

In the case of *Watson v. Jones*, 13 Wall. 679, it is said, on page 728: "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and

for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."

In the case of *Grimes v. Harmon*, 35 Ind. 198, 254 ; s. c., 9 Am. Rep. 690, it was held: "That over the church, as such, the legal tribunals do not have, or profess to have, any jurisdiction whatever, except to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatures to which they have voluntarily subjected themselves. But the civil courts will interfere with churches and religious associations, and determine upon questions of faith and practice of a church when rights of property and civil rights are involved."

In the case of *Chase v. Cheney*, 58 Ill. 509; s. c., 11 Am. Rep. 95, it was held, that the Constitution guarantees "from all interference by the State, not only each man's religious faith but his membership in the church, and the rights and discipline which might be adopted. The only exception to uncontrolled liberty is that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the State shall not be justified. Freedom of religious profession and worship cannot be maintained if the civil courts trench upon the domain of the church, construe its canons and rules, dictate its discipline and regulate its trials."

In the case of *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 136, it is said, on page 151: "Civil courts in this country have no ecclesiastical jurisdiction. They cannot revise or question ordinary acts of church discipline, and can only interfere in church controversies where civil rights or the rights of property are involved. Where a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries

O'Donovan v. Chatard.

the civil right and nothing more, taking the ecclesiastical decisions, out of which the civil right has arisen, as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction. The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective religious denominations to which they belong. When a person becomes a member of a church he becomes so upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are invaded. This doctrine inevitably results from that total separation between church and State which exists within the limits of the United States, and is essential to the full enjoyment of the guaranteed rights of American citizenship. Very naturally a different rule prevails in England, where church and State are united."

In the case of *German Reformed Church v. Seibert*, 3 Penn. St. 282, it is said on page 291: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do any thing but improve either religion or good morals."

In the case of *Shannon v. Frost*, 3 B. Monr. 253, it is said; "This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. And these we must decide, as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church. * * * The judicial eye of the civil authority of this land of religious liberty, cannot penetrate the veil of the church, nor can the arm of this court either reach or touch that

veil for the forbidden purpose of vindicating the alleged wrongs of the excised members. When they became members they did so on the condition of continuing or not, as themselves and their church might determine. In that respect they voluntarily subjected themselves to the ecclesiastical power, and cannot invoke the supervision or control of that jurisdiction by this or any other civil tribunal."

The Supreme Court of Illinois, in the case of *Ferraria v. Vasconcellos*, 31 Ill. 25, adopts and approves this language of the Kentucky court. See also *Bouldin v. Alexander*, 15 Wall. 131.

In the case of *Fitzgerald v. Robinson*, 112 Mass. 371, where an action was brought by a parishioner against a priest on account of excommunication, it was held that, "If the defendant was competent to pass sentence of excommunication, we cannot inquire into the grounds and regularity of the proceedings." See also *Grosvener v. United Society*, 118 Mass. 78.

In the case of *State of New Jersey v. Rector*, 45 N. J. L. 230, it was held that courts of law will interpose to control the proceedings of ecclesiastical bodies when a right to property is involved, but in no other instance.

In the case of *Chase v. Cheney, supra*, it is said, on page 535: "We have no right, and therefore will not exercise the power to dictate ecclesiastical law. We do not aspire to become *de facto* heads of the church, and by construction or otherwise abrogate its laws and canons. We shall not inquire whether the alleged omission is any offense. This is a question of ecclesiastical cognizance. This is no forum for such adjudication. The church should guard its own fold; enact and construe its own laws; enforce its own discipline; and thus will be maintained the boundary between the temporal and spiritual power."

In the case of *Gaff v. Greer*, 88 Ind. 122; s. c., 45 Am. Rep. 449, this court approved the rule announced in the case of *Shannon v. Frost, supra*, and adds: "The same rule is asserted in the following cases: *State v. Farris*, 45 Mo. 188; *Robertson v. Bullions*, 9 Barb. 64, 134; *German, etc., Church v. Seibert*, 3 Penn. St. 282; *Gibson v. Armstrong*, 7 B. Monr. 481; *Harmon v. Dreher*, 1 Speer Eq. 87." And it is further said, that "These authorities establish the proposition that the decision of one of these judicatories is binding upon the courts where such questions arise. It is said however that the appellants had no notice, and for that reason the order is a nullity. This was a question for the presbytery."

In the case of *Chase v. Cheney, supra*, it was further held that the civil courts will interfere with churches and religious associations when the rights of property or civil rights are involved, but will not revise the decisions of such associations upon ecclesiastical matters merely to ascertain their jurisdiction; also that the decisions of the ecclesiastical courts are final as to what constitutes an offense against the discipline of the church. In the dissenting opinion the question of jurisdiction as decided is stated as follows: "We understand the opinion as implying, that in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary, as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws or canons of the religious association to which it belongs, and its decision of that question is binding upon secular courts."

The case of *Connitt v. Reformed, etc., Church*, 4 Lans. 339, approved the rule established in the case of *Chase v. Cheney, supra*. And in that case it is further said: "We cannot fail to see, I think, that in this case the pastoral relation established between Mr. Connitt and the church of New Prospect was as purely ecclesiastical as that in which he stood as minister in the Reformed Church of America. His rights and duties as minister and as pastor were ecclesiastical, not civil; and the ecclesiastical tribunals of the Reformed Church of America alone could suspend or depose him from the ministry, or dissolve the relation which existed between him and the church, as pastor and people. His duties as minister, when placed over this church, were of a character peculiarly within the cognizance of the authorities of the church organization to which he belonged, and were to be performed in pursuance of the rules and usages of that organization; as minister and pastor he was amenable to no other organization; and such organization, through its different instrumentalities, consistories, classes, and synods, had entire control of both pastor and people in all ecclesiastical matters. The secular courts have no jurisdiction over the ecclesiastical rights of either pastor or people, and neither can resort to those courts for the protection or enforcement of such rights. * * Now inasmuch as the relation in question is not a civil one, dependent upon municipal law, but wholly ecclesiastical, and wholly dependent upon ecclesiastical rule, and its administration, by the church judica-

tories, it is not for this court to review the decisions and judgments of such church judicatories. Over them, and the administration of their rules and usages, we have no jurisdiction. No civil right is infringed by them in dissolving the pastoral relation. Mr. Connitt has no right to the continuance of such relation, cognizable in the civil courts, and consequently any wrong done him by the church courts, in its dissolution, is not one cognizable by the civil courts, either in an original or appellate proceeding. The right to salary, etc., it is true, is, by contract, made dependent upon the continuance of the pastoral relation. But this does not bring such continuance within the cognizance of the civil courts. They can inquire only into the fact of the continuance. The relation is nevertheless controlled by the ecclesiastical authorities; and the fact of their dissolution of it is conclusive." See the cases of *Dutch Church v. Bradford*, 8 Cow. 457, and *Robertson v. Bullions*, *supra*.

In the complaint under consideration, it is shown that the plaintiff was notified by the defendant that his case would be submitted to the diocesan councillors. But plaintiff insists that he was not notified that any charges had been preferred against him, or of the time and place of their hearing, as is required by the "*instructio*." But thereafter, to-wit, on the 2d day of December, 1880, the plaintiff was served with official notice by said defendant that his case for the non-payment of \$300, with interest, to said Hart, so claimed to be due as aforesaid from said congregation of St. Malachi's church, had been by him referred to the diocesan committee, and that on December 1st, 1880, the diocesan councillors had decided adversely to plaintiff, and that in consequence thereof said defendant informed plaintiff that unless said sum of \$300, with interest due, should be paid to said Hart within two weeks from said 1st day of December, 1880, plaintiff would cease *ipso facto* to be rector of the congregation of Brownsburg, and likewise all plaintiff's faculties, of every nature, as such priest or rector, would also cease. That he failed to pay the money within the time, and the defendant removed him from his said clerical office of priest and rector, and deprived him of all the benefits and emoluments thereof.

The complaint shows an adjudication of the plaintiff's case by the proper ecclesiastical authorities of the church to which he belonged, and according to the foregoing authorities, it is not for this court to inquire whether that adjudication was regular or ir-

 Bloom v. Franklin Life Insurance Company.

regular, right or wrong; it is final in the premises. Another case between these same parties, growing out of the same transaction, and in relation to the church property, has heretofore been before this court. *Chatard v. O'Donovan*, 80 Ind. 20; s. c., 41 Am. Rep. 782. In the conclusion of the opinion in that case this court said: "We are however of the opinion that the relation of the parties was more like that of master and servant — the possession of the priest being in fact the possession of his superior, the bishop, who had power at any time and upon his own judgment or discretion to remove one and install another in the office of pastor, and in the possession of the property of the office."

If master and servant was the true relation between the parties, the master certainly had the right to dissolve that relation, without giving the servant a right to an action in the civil courts for its mere dissolution; or if the bishop had discretionary powers to remove the priest, clearly no action at law would lie for the exercise of such discretionary powers.

Viewing this case in all the lights surrounding it, we see no principle of the law upon which this action can be maintained.

There is no error in striking out parts of the complaint, or in sustaining a demurrer to it. The judgment ought to be affirmed.

PER CURLAM. It is therefore ordered, upon the foregoing opinion, that the judgment of the General Term of the court below be, and it is in all things affirmed with costs.

Judgment affirmed.

 BLOOM V. FRANKLIN LIFE INSURANCE COMPANY.

(97 Ind. 478.)

Insurance — life — "violation of law" — assault.

A life insurance policy was conditioned to be void if the insured should die "in the known violation of law." He assaulted a married woman, without cause or justification, and her husband, while defending her, killed him. *Held*, that the policy was avoided.*

ACTION on a life insurance policy. The opinion states the case. The defendant had judgment below.

* To same effect, *Murray v. New York Life Ins. Co.* (96 N. Y. 614), 48 Am. Rep. 658.

Bloom v. Franklin Life Insurance Company.

H. D. McMullen, D. T. Downey and F. Heiner, for appellants.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

ELLIOTT, C. J. The policy of insurance upon which the appellant's complaint is founded contains a provision that if the assured shall die by reason of intemperance from the use of intoxicating liquors, or in the known violation of the laws of the States or of the United States, the policy shall be void. The answer of the appellee, after setting forth the provision of the policy, proceeds as follows: "And this defendant avers that the said August Bloom, the assured, came to his death in the following manner, to-wit: On or about the 29th day of December, 1881, the said August Bloom, while in a state of intoxication from the use of intoxicating liquors, did commit an assault and battery upon one Wilhelmina Bloom, the wife of his brother, Albert Bloom, at the town of Aurora, and State of Indiana, and while thus engaged in perpetrating said assault and battery, and while violently beating, bruising, choking and maltreating her, the said wife of his brother, he, the said August, being at the time in a state of intoxication, his brother, the said Albert, did then and there, for the purpose of lawfully defending his wife against said assault and battery, strike the said August Bloom upon the head with a jack plane, or some other wooden instrument, thereby fracturing the skull of him, the said August, and causing his death within a few hours thereafter."

There can be no question as to the force and validity of the provision of the policy declaring it to be of no effect in the event that the assured shall come to his death from the effects of intemperance, or while engaged in willful violation of the law. We do not indeed understand the appellant as insisting upon the invalidity of this provision, but as asserting that the facts stated do not show that the assured died from the effects of intemperance, or that he met his death while engaged in knowingly violating the law.

We do not think that an answer, averring that the assured came to his death while engaged in violating the law, need be framed with the same precision as would be necessary in an indictment in a criminal prosecution. The rules of pleading in civil cases are not so rigid and strict as they are in prosecutions for criminal offenses. We cannot therefore accept as a just standard the rule

Bloom v. Franklin Life Insurance Company.

which obtains in cases of indictments, but even in such cases the pleading is good if it describes the offense in the language of the statute, or in language of equivalent meaning.

The answer charges that the assured did commit an assault and battery, and then sets forth the facts constituting the offense. It is true that the language of the statute defining the offense is not pursued, but we do not think that this was necessary, for all that it was incumbent upon the appellee to do was to state such facts as would enable the court to conclude as matter of law, that there was an assault and battery committed. The facts stated warrant this conclusion. It is not necessary in a complaint to anticipate defenses, nor is it necessary in an answer to anticipate matters that might be replied in avoidance. In the one case it is sufficient to make a *prima facie* cause of action, and in the other to make a *prima facie* defense. We can see no reason for taking this case out of the general rule. It is true forfeitures are odious and that courts are slow to enforce them, but this consideration does not affect the rules of pleading. The reluctance of courts to enforce forfeitures does not change the rules of pleading, but does in a high degree affect the causes assigned in support of the claim of forfeiture. The question under the rule against enforcing forfeitures is not in what manner are the grounds of forfeiture pleaded, but it is, what are the grounds? Are they so important and material as to compel a declaration of forfeiture? If in this case the answer shows that the assured came to his death in the known violation of law, then there is a cause of forfeiture shown, no matter how inartistically drawn the pleading may be; for the inquiry is, not as to the manner of pleading, but as to the substance of the plea. It seems quite clear that the facts stated would be abundantly sufficient in a complaint to recover damages for an assault and battery, and if this be true, there is no reason why they should not be sufficient when the assault and battery is pleaded as a defense. If the facts are such as show an assault and battery, then if an assault and battery is a defense, the pleading is sufficient, no matter what may be the character of the action in which it is interposed. The pleading under immediate mention does state facts constituting an assault and battery, and does show an offense involving a willful violation of law. At all events the facts stated in the answer and admitted by the demurrer are enough to put the appellants to a reply.

Bloom v. Franklin Life Insurance Company.

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Bloom v. Franklin Life Insurance Company.

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Bloom v. Franklin Life Insurance Company.

Granting it to be true, as decided in *Cluff v. Mutual, etc., Insurance Company*, 13 Allen, 308, that the violation of law must, in order to avoid the policy, be a breach of some criminal statute, still the answer is good, for courts judicially know that an assault and battery is an offense punishable as a crime. The words "assault and battery," employed in the answer have, and for centuries have had, a definite and settled meaning, and we can assign that meaning to them, not only without encroaching upon any rule of law, but in close harmony with long and firmly settled principles. We may, with justice and propriety, apply to the pleading before us the rule adopted in *Burk v. State*, 27 Ind. 430, where it was held that a crime was well defined if the legislature employed a phrase of a definite and settled meaning. In that case the phrase was "public nuisance," and it was held to be a sufficient definition of the offense. *State v. Berdella*, 73 Ind. 185, *vide* opinion, 196; s. c., 38 Am. Rep. 117. Taking the general words used in the answer, in conjunction with the statement of specific facts, it appears with reasonable certainty that there was a violation of a criminal statute. We do not affirm that the words "assault and battery" would of themselves be sufficient. Not that, by any means; but we do affirm that the words, used as they are in that clause of the answer, reading, "while thus engaged in perpetrating said assault and battery, and while violently beating, bruising, choking, and maltreating her, the said wife of his brother," are to be considered in determining the character of the violence used upon the person of Mrs. Bloom. The words have a settled meaning quite as full and definite as the word "unlawful," and it is but following the ruling in *Burk v. State, supra*, to give them their well known meaning. If the word "unlawful" had been used, the substantial requisites of an indictment would have been present. *State v. Smith*, 44 Ind. 557. It seems to us that the words used, taken in connection with those with which they are immediately associated, and in connection with the clause contained in the concluding part of the answer, which reads, "And this defendant says that by reason of his said intoxication and of his said violation of the law in committing such assault and battery, the said August Bloom was then and there in the known violation of the laws of Indiana," fully show that an offense punishable by the criminal laws of the State was committed by the assured. We do not hold that the averments in the concluding part of the answer control,

Bloom v. Franklin Life Insurance Company.

but we do hold that in determining the whole tenor and drift of the pleading they are proper for consideration.

The soundness of the decision in *Cluff v. Mutual, etc., Insurance Company, supra*, upon the point immediately under discussion, is questioned in the well-considered case of *Bradley v. Mutual, etc., Insurance Company*, 45 N. Y. 422; s. c., 6 Am. Rep. 115, and was denied in the same case by the Supreme Court of New York. It does seem a wide stretch of judicial power to affirm that a clause reading, "Or in case he shall die by his own hand, or in consequence of a duel, or by reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of any law of these States, or of the United States, or of the said provinces, or of any other country which he may be permitted under this policy to visit or reside in, this policy shall be void," refers solely to criminal laws. If the words employed are taken in their usual signification, it would seem quite clear that death in the known violation of any law, criminal or civil, would make the policy inoperative. An illustration was put by GROVER, J., in *Bradley v. Mutual, etc., Ins. Co., supra*, which goes far to show the unsoundness of the decision in *Cluff v. Mutual, etc., Ins. Co., supra*: "Again, suppose the death occurred from injury received while the assured was attempting to obtain by force the possession of a chattel of which another was in peaceable possession, the title to which was claimed by both, but which was really in the assured, the case would come within the proviso, for the reason that the risk was increased, and the death caused by the violation of law by the assured although such law was the civil only, the deceased having committed no breach of the peace or any indictable offense."

Suppose, as a further illustration, that the law prohibits a passenger from standing on the platform of a railway car while in motion, or that it prohibits persons from approaching within a specified distance of a blast about to be fired, would not a known violation of such a law increase the risk, and be within the letter and the spirit of the provision in the policy? On the other hand, it is not every violation of law which should absolve the company even though the law be a criminal one. Suppose a man violates our law against profanity, and is shot while doing it, should that absolve the company from liability? Again suppose a man violates our Sunday law by fishing, and while committing the offense is shot and killed, would that relieve the company? In a late case, *Hatch*

Bloom v. Franklin Life Insurance Company.

v. *Mutual Life Ins. Co.*, 120 Mass. 550; s. c., 21 Am. Rep. 541, a rule was declared which it seems difficult, if not impossible, to reconcile with that laid down in *Cluff v. Mutual, etc., Co., supra*, for it was held in the later case that where an assured submits to a surgical operation for the purpose of producing abortion, there can be no recovery upon the policy. It is true that the opinion puts the decision upon the ground of public policy, but when the real reason for the decision is reached, it will be found that it rests upon the ground that the act was in violation of the rights of the insurance company, for an act against public policy cannot relieve the company unless it is one increasing the risk. If a man should violate public policy by entering into an illegal conspiracy to prevent competition at a public sale, and this should lead to his death, we suppose no one would claim that because his act was against public policy the insurance contract was avoided. Again, if an assured should enter into a conspiracy to corruptly control the acts of a government official, or should enter into a marriage brokerage contract, and these acts should lead to his death, it would be clear that the policy of insurance would not be rendered void. In our opinion the law is this: A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk.

Whether the violation of law was the proximate cause of death, and whether it was an act increasing the risk, must in general be determined from the facts of the particular case. There must in all cases, whether the law violated be a criminal or a civil one, be some causative connection between the act which constituted the violation of law, and the death of the assured. A man engaged in uttering counterfeit money might meet his death while so engaged, and yet there might be circumstances which would destroy the causal connection between the death and the violation of law, and in such a case it is clear that a company would not be relieved from liability. On the other hand, an assured might bring on his death while engaged in the violation of a civil law, as for instance, in the case of an attempt to force an entrance into a man's house for the purpose of arresting him on civil process. Another illustration may be found in the case of a

Bloom v. Franklin Life Insurance Company.

railway engineer who in violation of law neglects to sound signals and brings on a collision in which he perishes, and a hundred examples are supplied in cases of collisions at sea or on navigable streams, brought about by a violation of maritime laws. It would not be difficult to multiply examples proving that the rule must be that the known violation of a positive law relieves the company where the act constituting the violation is the proximate cause of death, whether the positive law violated be a civil or a criminal one.

The act of the assured in this case was the proximate cause of his death within the meaning of the law. A man who makes a violent assault upon a woman puts his own person in danger, for a father, a husband, or a child may interfere to protect the assailed woman, and may overcome the assailant by force. Strangers not only may interfere to protect the person violently assaulted, but are in strict law under a duty to interfere. The natural result of such an illegal act as that of the assured therefore was to bring his person into danger, and as death resulted his own act was the proximate cause. It may well be doubted whether an assured who violently assaults another does not cause a forfeiture, even though the rescuer uses excessive force; but that point we need not decide, for the interference in this instance was a lawful one. While the unlawful act of the assured must tend in the natural line of causation to his death, in order to work a forfeiture, it is not necessary that the act should be the direct cause, nor that the precise consequences which actually followed could have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for in such a case the ultimate result is traced back to the original proximate cause. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346; *Cincinnati, etc., R. Co. v. Eaton*, 94 id. 474; *Dunlap v. Wagner*, 85 id. 529; s. c., 44 Am. Rep. 42; *Binford v. Johnston*, 82 Ind. 426; s. c., 42 Am. Rep. 508; *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166; s. c., 40 Am. Rep. 230. In the case of *Cluff v. Mutual, etc., Co.*, *supra*, the decision was that where the assured made an assault upon another, and the person assaulted killed him, the policy was forfeited. The same general doctrine was maintained in *Bradley v. Mutual, etc., Ins. Co.*, *supra*, but it was held that where there was any conflict of evidence, the question of whether the death was the natural result of the wrongful act must

Bloom v. Franklin Life Insurance Company.

be left to the jury. In the case of *Insurance Co. v. Seaver*, 19 Wall. 531, the assured was driving in a race, a collision took place, he leaped from his sulky and was killed, and the court held that death was proximately caused by the unlawful act of racing. The subject received consideration in *Miller v. Mutual Benefit Ins. Co.*, 34 Iowa, 222, where the assured, while suffering from a fit of delirium tremens, escaped from his keepers, ran out into the street in very inclement weather, and by the exposure brought on another form of disease which was the immediate cause of death. The court held that the proximate cause of death was the excessive use of intoxicating liquor. But there is really no reason for endeavoring to find insurance cases, for the fundamental principle must be the same whether the contract is one of insurance or an ordinary commercial agreement. The fundamental principle is as old as the "Squib case" on the civil side of the common law, and on the criminal side as old at least as the time of Sir Matthew Hale. 1 Hale P. C. 428; 1 Hawk. P. C. 93; *Kelley v. State*, 53 Ind. 311; *Harvey v. State*, 40 id. 516; *Terre Haute, etc., R. Co. v. Buck*, 96 id. 346, 350.

Courts cannot be ignorant of the nature of men, and must attribute to them the ordinary passions and weaknesses inherent in human nature. It has been expressly adjudged that courts may presume that domestic animals will act in conformity to their usual propensities and habits, and surely there is stronger reason for extending this principle to beings of intelligence, reason and affections. Whart. Neg., §§ 100, 107; *Billman v. Indianapolis, etc., R. Co.*, *supra*. It has indeed been laid down by respectable authority that notice will be taken of the habits of men acting in masses, and if this be true, it must also be true that notice will be taken of what an ordinary man would likely do under a known state of affairs. Whart. Neg., § 108. These considerations lead to the conclusion that a man who beats and maltreats another's wife may reasonably expect the husband to defend her without being careful to select the means of defense or to nicely weigh the degree of force. To expect a husband to act coolly and with careful circumspection in such a case is to expect an unreasonable thing. The probability is that the husband will in such a case use force, and this makes it probable that the one who assaults the wife will encounter force at the hands of the husband, and what is probable is, in legal contemplation, to be expected. *Billman v.*

Bloom v. Franklin Life Insurance Company

Indianapolis, etc., R. Co., supra, and authorities cited. If therefore an assured does assault another's wife, he does an unlawful thing which he must expect will bring upon him violence from the husband, and if this force leads to death, then the proximate cause of death is the unlawful act which provoked the use of violence.

The violation must be a known one, and we are inclined to think that the law violated must be a known one, that is, must be one of which the violator has, or should have, actual knowledge. But there are many things of which no man can be ignorant, and among the things of which no one can be ignorant is, that it is against the law to commit murder, to steal, or to violently beat another. We cannot doubt that the beating of Mrs. Bloom was an act known by the assured to be a violation of law.

The fact that the assured was intoxicated when he committed the assault and battery upon his brother's wife does not change the law. Drunkenness is no excuse for crime. *Goodwin v. State*, 96 Ind. 550, and authorities cited. A man who voluntarily makes himself drunk is in a measure responsible for his own irresponsibility. But waiving this consideration, the degree of intoxication does not appear to have affected the mental capacity of the assured, and the presumption here is, as in all cases, that the mental condition was a normal one.

There is no force in the proposition that the assured did not lose his life in a known violation of law, but in consequence of the violation. The cause of the cause is in law sufficient, and the cause of the cause of death was the blow given while the assured was in the act of violating the law, and it is not material whether death did or did not immediately ensue. *Terre Haute, etc., R. Co. v. Buck, supra*.

What we have said disposes of all the questions in the case, and it is not necessary to examine the special finding.

Judgment affirmed.

HIBBITS V. JACK.

(97 Ind. 570.)

Will — restraint of marriage.

A devise to the testator's wife "so long as she shall remain my widow" is not in restraint of marriage.*

ACTION to quiet title. The opinion states the facts. The defendant had judgment below.

J. S. Buckles and J. W. Ryan, for appellant.

O. T. Boaz, W. W. Herod and F. Winter, for appellees.

NIBLACK, J. In his life-time and at the time of his death, as hereinafter stated, John Jack was, in addition to a considerable amount of other property both real and personal, the owner of one undivided third part of a tract of land in Delaware county, estimated to contain sixty-five acres, upon which a flouring mill and its appurtenances were situate.

On the 27th day of September, 1859, the said Jack executed and published his last will and testament, which contained, amongst others, the following provision:

"I hereby give, devise and bequeath to my beloved wife, so long as she shall remain my widow, all of my goods, chattels, rights, credits, moneys and effects, of every kind and character whatever, and all of my right, claim and interest of, in and to any and all real estate, wherever situated, of which I am or may be at any time seised or possessed, which may remain after payment of all my just debts."

Early in the month of October then next ensuing Jack died, leaving his will so executed and published in full force, and Susan Jack, as his widow, and Emily E. Jack, since intermarried with Edward H. Valentine, Martha M. Jack, since intermarried with William L. Little, Parmelia R. Gilbert, Mary E. Wood and Florence T. Jack, since intermarried with James E. Howe, as his only children surviving him.

* See *Crawford v. Thompson* (91 Ind. 266), 46 Am. Rep. 598; *Bostick v. Blades* (59 Md. 281), 43 Am. Rep. 548; *Stillwell v. Knapper* (69 Ind. 558), 35 Am. Rep. 240.

Hibbits v. Jack.

The will was in a few days thereafter duly admitted to probate, and the widow elected to take under that instrument instead of under the statute.

The widow also went immediately into the possession of her late husband's one undivided third part of the mill and its appurtenances under the will, and so continued until the 16th day of July, 1874, when she sold, and by warranty deed conveyed said undivided third part of the mill tract of land, with the appurtenances, to Wallace Hibbits, the appellant herein, for the sum of \$9,000. The sale and conveyance were made as above upon the theory that the devise of the real estate, herein above set out, was in restraint of marriage, and consequently void, and that it had, in legal effect, been so held in the case of *Spurgeon v. Scheible*, 43 Ind. 216, which had then but recently been decided, and that in consequence she, as widow, was the owner in fee simple of the real estate devised to her by the will.

Hibbits went into possession of the property thus sold and conveyed to him, claiming to be the owner in fee simple, and so remains in possession, having in the meantime made valuable improvements thereon. The widow still survives and has never remarried.

This was a suit by Hibbits against the widow and children of John Jack, and the surviving husbands of such children, to quiet his title to the mill property so purchased by him, alleging that the defendants, other than the widow, claim to be the owners in fee simple of such property, and that they will be entitled to succeed to, and to enter into the possession of the same after the death of the said widow, thus casting a cloud upon his title.

It is unnecessary that we shall notice all the pleadings and the proceedings upon each particular pleading. It is sufficient to state that the defendants, other than the widow, filed a cross complaint, substantially repeating the historical facts of the case contained in the complaint, alleging that the claim of Hibbits was a cloud upon their title, demanding that their title be quieted, and making Hibbits and the widow defendants to the cross complaint. Hibbits, answering the cross complaint, averred that at the time he purchased the interest in the mill property in controversy, it had been held by this court that devises to the widow of a testator, precisely similar to the one involved in this case, conferred an estate in fee simple upon the devisee, and that this construction of such

devises had been adopted by all the courts, and accepted and acted upon by all the citizens of this State; that it was consequently understood and believed by him that Susan Jack, the widow, was seised in fee simple of the real estate devised to her by her husband, and that the plaintiffs, in the cross complaint, acquiesced in that construction of their ancestor's will. Wherefore it was claimed that the plaintiffs, in the cross complaint, were estopped from asserting any claim of title to the property in dispute.

The Circuit Court sustained a demurrer to this answer, and the appellant declining to plead further, final judgment was rendered against him upon the cross complaint.

This and other rulings upon the pleadings present the questions: *First*. What estate did Susan Jack take under her late husband's will? *Second*. If only an estate during widowhood, then were her co-defendants below estopped from asserting any claim of title to the property conveyed by her to the appellant?

The last clause of section 2 of the act concerning wills approved May 31, 1852 (2 R. S. 1876, p. 571), which has ever since been in force (R. S. 1881, § 2567), reads as follows: "A devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void."

Counsel for the appellant, with much ingenuity, as well as elaboration and ability, argue that the devise of real estate to Susan Jack, now before us, was in its very nature, and in its practical effect continues to be, a restraint upon marriage, notwithstanding some decisions of this court in analogous cases seemingly to the contrary, and the conclusion reached in the case of *Spurgeon v. Scheible, supra*, affords a precedent which ought to be followed, and which in any event must be considered as having entered into and become a part of the law of this case.

Whether the terms used in a devise or bequest ought to be considered words of limitation only, or really words of condition within the meaning usually attached to that phrase, constitutes often a very difficult question for decision. For that reason many of the cases intended to illustrate the difference between words of limitation on the one hand, and words of condition on the other, are obscure, and sometimes apparently capricious and arbitrary. This results from the ever varying phraseology employed in making devises and bequests. But when questions involving that difference arise, the courts must decide them as best they can, having

Hibbits v. Jack.

reference to established precedents and the fair meaning of the words to be construed, when taken in connection with the other parts of the will. As illustrative of the difference in question, Sir William Blackstone states the rule to be as follows: "If an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtain a benefice, the respective estates are absolutely determined and gone." 2 Bl. Com. 121. And continuing at another place, says: "A distinction is however made between a condition in deed and a limitation, which Littleton denominates also a condition in law. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation; as when land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made 500*l*, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l*), and the next subsequent estate which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is strictly speaking upon condition in deed (as if granted expressly upon condition to be void upon the payment of 40*l* by the grantor, or so that the grantee continues unmarried, or provided he goes to York, etc.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate." 2 Bl. Com. 155.

In 2 Bouvier's Institutes, p. 272, section 1811, the same distinction is thus illustrated: "There is a marked difference between a condition and limitation, which should be remembered. A condition is a provision respecting a future and uncertain event, on the existence or non-existence of which is made to depend, either the accomplishment, the modification or the rescission of a contract or testamentary disposition. In such case the estate or thing is granted or given absolutely, without limitation, but the title to it is subject to be divested by the happening or not happening of an uncertain event. For example a man may give an estate to his

wife provided she shall continue to reside on it; or he may give it to her upon condition that she shall not marry.

“ The first of these conditions is lawful, and if she remove from the premises she may forfeit the estate; but the last being in restraint of marriage is void, and the wife shall take the estate unconditionally.

“ When, on the contrary, the thing or estate is granted or given until an event shall have arrived, and not generally, with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation; as if the estate is given while, or as long as a woman shall remain a widow, or until she shall marry, the estate being given to her only during the time of her widowhood and no longer, it determines by her marriage, and all her right to it is gone.”

In 2 Wash. Real Prop. (4th ed.), p. 25, § 28, it is said: “ The only general rule, perhaps, in determining whether words are words of condition or of limitation, is that where they circumscribe the continuance of the estate, and mark the period which is to determine it, they are words of limitation; when they render the estate liable to be defeated, in case the event expressed should arise before the determination of the estate, they are words of condition.”

Tiedeman on Real Property, at section 281, says: “ An estate upon limitation is one which is made to determine absolutely upon the happening of some future event as an estate to A., so long as she remained a widow. The technical words, generally used to create a limitation, are conjunctions relating to time, such as during, while, so long as, until, etc.”

In 2 Jarm. Wills, 566, the rule concerning limitations is thus stated: “ But a bequest during celibacy is good; for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage. This is not a subtlety of our law only; the civil law made the same distinction. And no gift over is required to make the restriction in this form effectual.”

The item of the will of Harmon, particularly considered by this court in the case of *Harmon v. Brown*, 58 Ind. 207, to which frequent reference has been made by counsel on both sides, was in the following words:

“ First, I give and bequeath unto my beloved wife, Penina, during her widowhood, all my real and personal estate, to be held and freely possessed and enjoyed during her widowhood.”

The widow, some years after the death of the testator, inter-

Hibbits v. Jack.

married with one Brown, and the court below in that case held in effect that the item of the will set out contained words of condition in restraint of marriage, and gave judgment accordingly. This court reversed the judgment, holding that the words used in the item were words of limitation, and not of condition, and expressly overruled the case of *Spurgeon v. Scheible, supra*, to which reference has been made in so far as it seemingly recognized or established a different rule of construction. This case of *Harmon v. Brown, supra*, has either been cited approvingly or expressly followed by this court in the cases of *Coon v. Bean*, 69 Ind. 474; *Stillwell v. Knapper*, id. 558; s. c., 35 Am. Rep. 240; *Brown v. Harmon*, 73 Ind. 412; *Tate v. McLain*, 74 id. 493; *O'Harrow v. Whitney*, 85 id. 140.

The case of *Harmon v. Brown, supra*, followed the construction inferentially approved in the much older case of *Rumsey v. Durham*, 5 Ind. 71, to which no reference is made in *Spurgeon v. Scheible, supra*, and was, as it still is, supported by the prevailing, and as it seems to us unquestionable weight of authority. *Coppage v. Alexander*, 2 B. Monr. 313; 38 Am. Dec. 153; *Vance v. Campbell*, 1 Dana, 230; *Rodgers v. Rodgers*, 7 Watts, 15; *Doyal v. Smith*, 28 Ga. 262; *Pringle v. Dunkley*, 14 S. & M. 16; 53 Am. Dec. 110; *Hawkins v. Skeggs*, 10 Humph. 30; *Chapin v. Marvin*, 12 Wend. 538; *Beekman v. Hudson*, 20 id. 53.

In the case of *O'Harrow v. Whitney, supra*, this court held that where a husband dies, leaving a wife and two children surviving him, having first devised his land to his wife during widowhood, and she elects to accept the provision made for her by the will, her estate is limited in duration to the period of her widowhood, and that a purchaser, through a mortgage executed by the widow after a subsequent marriage, acquires no title to any part of the land. To that doctrine this court, as has been seen, is committed by a series of cases, and in the light of the authorities herein cited, and of others to which our attention has been called, from that doctrine we ought not to and hence cannot now recede.

Our conclusion therefore necessarily is that the words used in the devise before us in this case were words of limitation merely, and not of condition in restraint of marriage, and that in consequence the estate which Susan Jack took in the lands devised to her will not extend beyond the expiration of her term of widowhood.

[Omitting a minor consideration.]

The judgment is affirmed, with costs.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

**ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY V.
THUL.**

(88 Kans. 265.)

Evidence — expert — weight of.

In an ordinary case it is error to instruct the jury that expert medical testimony should be received and weighed with caution.

ACTION for personal injury by negligence. The plaintiff had judgment below. The opinion states the point.

A. A. Hurd, Robert Dunlap, W. C. Campbell and Geo. W. McCrary, for plaintiff in error.

Case & Curtis, for defendant in error.

VALENTINE, J. This was an action brought by John Thul against the Atchison, Topeka and Santa Fe Railroad Company, to recover damages for injuries alleged to have been caused through the negligence of the agents and servants of the defendant in operating its railroad. The alleged injuries occurred about December 15, 1881, and were principally to the plaintiff's eyes, and were alleged to have been caused by the defendant's agents and servants

Atchison, Topeka and Santa Fe Railroad Company v. Thul.

throwing hot water or steam into the plaintiff's face and eyes from an engine belonging to the defendant. The case was tried before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff and against the defendant, assessed the plaintiff's damages at \$2,000, and also made numerous special findings in the case. The defendant moved for judgment upon the special findings, and also filed a motion to set aside the verdict and findings, and for a new trial; which motions were overruled by the court, and judgment rendered in favor of the plaintiff and against the defendant for \$2,000 and costs. To reverse this judgment the defendant now prosecutes a petition in error in this court.

The first point made in this case is that the evidence is not sufficient to sustain any judgment or verdict in favor of the plaintiff and against the defendant, and therefore that the judgment of the court below should be reversed.

[Omitting this.]

But a still more serious question arises. Was not the jury misled by a certain instruction of the court below and being so misled, did they not award the plaintiff excessive damages? The instruction reads as follows:

"*Ninth.* There has been some evidence in the case known as 'expert testimony.' In respect to such testimony I instruct you that its value depends upon the learning and skill of the expert witness, and on the nature of the subject of investigation. The value of such testimony varies with the circumstances of each case, and of these circumstances the jury must be the judges; and you must determine whether great or little weight is to be accorded to it. But in all cases such testimony should be received and weighed with caution."

The defendant excepted to this instruction, but really complains of only the last sentence thereof, to-wit: "But in all cases, such testimony (that of experts) should be received and weighed with caution." Counsel for the defendant ask: "Why should the testimony of experts in all cases be received and weighed with caution? Is there such a probability of mistake in science that opinions based upon facts are to be received with caution?" We think this question is pertinent in the present case for the reason that the defendant based its whole defense almost entirely upon the testimony of medical experts; and these medical experts were not ignorant men brought in merely by the defendant itself to testify as partisans in

its defense or to prove its case, but they were educated physicians and surgeons of long experience, eminent in their profession, and one of them was not only a physician and surgeon but was also an oculist who had made diseases of the eye a specialty for several years, and they were all appointed by the court itself to make a professional examination of the plaintiff's eyes, because of their skill and competency in such matters. They made the examination and testified in the case, stating what they saw and observed, with their opinions and conclusions; and this is a portion of the "expert testimony" which the court below instructed the jury "should be received and weighed with caution."

If the testimony of these witnesses is to be relied on, the plaintiff should not have recovered any very large amount of damages; indeed he should have recovered but very little more than nominal damages. These witnesses testified that the plaintiff's blindness could not have been caused by water and steam as he claims that it was, but that it was caused by many years of disease of the eyes, by inflammation, granulation, irritation and consequent opacity of the cornea. The plaintiff testified that his eyes and face were burned and scalded by hot water and steam, but the expert witnesses testified that this could not be true, for the reason that there are no evidences of any loss or destruction of tissue; that the effect of burning or scalding is immediate, while it is shown by the evidence in this case that the plaintiff continued to work, or try to work as a section hand for two days after the water was thrown in his eyes, that water if not hot enough to burn or scald could not produce blindness such as the plaintiff is afflicted with, and that opacity of the cornea, without destruction of the tissues, and such as the plaintiff is afflicted with cannot be produced from any cause within a few days, or a few weeks, or a few months, or even within the longest period of time within which the plaintiff claims that he became blind, or nearly blind, after the water was thrown in his face and eyes, but can be produced only by disease for years.

As before stated, the plaintiff was partially blind before this water was thrown in his eyes; and he is not totally blind yet; but he cannot see as well now as he could before the water was thrown into his eyes.

This case has been twice before a jury, and this is the second time that it has been to this court. *A., T. & S. F. R. Co. v. Thul*, 29 Kans. 465. On the first trial the jury found the plaintiff's

Atchison, Topeka and Santa Fe Railroad Company v. Thul.

damages to be \$400, while on the second and last trial, the jury found the plaintiff's damages to be \$2,000, as before stated. Evidently the jury paid but very little attention to the expert testimony of the physicians and surgeons appointed by the court, and who testified in this case; and their reason for so doing may have been the above-quoted instruction given to them by the court. We think that such testimony should have been given due and proper weight, and should not have been "received and weighed with caution." In the case of *Carter v. Baker*, 1 Sawyer, 512, the presiding judge laid down the following rule: "The testimony of experts is to be considered like any other testimony; is to be tried by the same tests and receive just as much weight and credit as the jury may deem it entitled to when viewed in connection with all the circumstances." We think this is probably as good a general rule as any that could be adopted. Mr. Lawson, in his work on *Expert and Opinion Evidence*, p. 230, states the rule as follows: "The testimony of experts is entitled to the same credit, is to be tested by the same rules as are applied to the evidence of other witnesses, and should have weight with the jury according to their opportunities and qualifications; but it is not conclusive."

Mr. Rogers, in his work on *Expert Testimony*, p. 65, § 42, makes the statement that "It is evident that the value of expert testimony depends on the learning and skill of the expert, and on the nature of the subject of investigation. If the subject of inquiry relates to the cause, nature or effect of disease for instance, the opinions of eminent or learned physicians would be entitled to the very highest consideration."

But in another part of the same section Mr. Rogers uses the very language, with the addition of the word "great" which the court in the present case used in the foregoing instruction. Mr. Rogers says: "But in all cases the testimony of experts is to be received and weighed with great caution." This language just quoted might be proper in some cases, but it certainly cannot be proper in all cases, and it cannot be proper in the present case. We think the language first quoted from Mr. Rogers' work on *Expert Testimony* is correct. The opinions of eminent and learned physicians and surgeons and oculists are entitled to great consideration, at least where they have made a personal examination of the subject, as in the present case. In the case of *Anthony v. Stinson*, 4 Kans, 221, this court used the following language: "It is not for the

Atchison, Topeka and Santa Fe Railroad Company v. Thul.

court to instruct the jury as to what part of the testimony before them shall control their verdict; but the jury must weigh all the testimony before them, decide as to its credibility, and as to the weight which should be given to it in making up the verdict. The testimony of experts, or professional witnesses is often very important, and justly entitled to great weight in a cause; but it must have its legitimate influence by enlightening, convincing and governing the judgment of the jury and must be of such a character as to outweigh by its intrinsic force and probability all conflicting testimony."

While many courts speak disparagingly of some kinds of expert testimony—that with regard to handwriting, for instance—yet we think that all courts hold that the testimony of competent medical experts is entitled to great respect and consideration. *Pannell v. Commonwealth*, 86 Penn. St. 260; *Eggers v. Eggers*, 57 Ind. 461; *Cueno v. Bessoni*, 63 id. 524; *Jarrett v. Jarrett*, 11 W. Va. 584, 626; *Thomas v. State*, 40 Tex. 65; *Pitts v. State*, 43 Miss. 472, 480; *Templeton v. People*, 3 Hun, 357; *Choice v. State*, 31 Ga. 424, 481; *Flynt v. Bodenhamer*, 80 N. C. 205; *Getchell v. Hill*, 21 Minn. 471; *Wood v. Barker*, 49 Mich. 295, 298; *Rogers Expert Testimony*, 268, 269.

See also with reference to expert testimony, the authorities heretofore cited, and *Humphries v. Johnson*, 20 Ind. 190; *Tinney v. N. J. Steamboat Co.*, 12 Abb. Pr. N. S. 1.

There are many cases in which we would think that the language used by the court below in the foregoing instruction would not be materially erroneous; for in many cases expert testimony founded merely upon the opinions of expert witnesses would be almost wholly worthless. We have all seen such cases; and in such cases the expert testimony should of course "be received and weighed with caution;" but the weight and value of such testimony are questions for the jury; and it is not for the court to determine or to instruct the jury as to how much or how little weight should be given to such testimony. In the present case we think the expert testimony of the physicians and surgeons who were in fact appointed by the court, and who made a personal and professional examination of the plaintiff's eyes, is entitled to great consideration and that the court below erred when it instructed the jury that such testimony should "be received and weighed with caution." Believing that the foregoing instruction is erroneous and that it

Norris v. Corkill.

may have misled the jury, the judgment of the court below will be reversed, and the cause remanded for a new trial.

Reversed and remanded.

All the justices concurring.

NORRIS V. CORKILL.

(33 Kans. 409.)

Marriage — liability of husband for wife's tort.

A husband is not liable for slanderous words spoken by his wife without his participation.*

ACTION for slander. The opinion states the point. Defendant had judgment below.

C. W. C. Jones, and O. H. Bently, for plaintiff in error.

Stanley & Wall, for defendants in error.

HORTON, C. J. The question presented in this case is, whether the husband is liable for the slanderous words spoken by his wife when he is not present and in which he in no manner participates. The rule of the common law makes the husband liable for the torts of his wife committed during coverture. The reason assigned for this liability is, that the husband is entitled to the rents and profits of the wife's real estate during coverture, and to the absolute dominion over her personal property in possession. Another ground of this liability at common law, sometimes given, is that the wife, by her marriage, is entirely deprived of the use and disposal of her property and can acquire none by her industry; that her person, labor and earnings belong unqualifiedly to the husband. Reeves Dom. Rel. 3; Tyler Inf. and Cov., § 233.

Again, the husband by common law might give the wife moderate correction, for as he was to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children, for

* See, *contra*, *Tait v. Culbertson*, 57 Barb. 9; *Fitzgerald v. Quann*, 33 Hun, 652.

whom the master or parent is also liable in some cases to answer. 1 Bl. Com. (Wendell's ed.) 444, 445.

Under the provisions of our statute, the reasons assigned for the liability of the husband for the torts of his wife no longer hold good, and therefore in our opinion, under the changes made by the statute, the liability no longer exists. It is a part of the common law that where the reason of the rule fails, the rule fails with it.

At common law the husband had control almost absolute over the person of the wife; he was entitled, as the result of their marriage, to her services, and consequently to her earnings; to her goods and chattels; had the right to reduce her choses in action to possession during her life; could collect and enjoy the rents and profits of her real estate, and thus had dominion over her property and became the arbiter of her future. She was in a condition of complete dependence; could not contract in her own name; was bound to obey him, and her legal existence was merged in that of her husband, so that they were termed and regarded as one person in law. *Martin v. Robson*, 65 Ill. 129; s. c., 16 Am. Rep. 578. Tyler Inf. and Cov., ch. 19, §§ 216-233.

Under the statute, "The property, real and personal, which any woman in this State may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts." Comp. Laws of 1879, ch. 62, § 1.

"A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent and with like effect, as a married man may in relation to his real and personal property." § 2 of ch. 62, *supra*.

"Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name." § 4 of ch. 62, *supra*.

In addition, § 3 of said chapter provides that a woman may, while married, sue and be sued in the same manner as if she were

Hummer v. Lamphear

unmarried. Therefore it is not true, under the existing statute, that the wife, by her marriage, is deprived of the use and disposal of her property; nor is she prohibited from acquiring property by her own industry. It is not true under the statute, that the personal property of the wife passes to the husband; nor is he entitled to the rents and profits of her real estate during coverture; nor has he any dominion over her personal property, her labor, or her earnings. If she so desires, they are unqualifiedly her own, and he cannot interfere with them.

Again, in this State, the common-law power of correction of the wife by the husband is no longer tolerated. Under the common law, the married woman's legal existence was almost entirely ignored. She was sunk into almost absolute nonentity, and rested in almost total disability; but all of this has been changed by the statute, and to-day in our State, "her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself."

Martin v. Robson, supra. Our conclusion is that the provisions of our statute change the common-law rule, and thereby discharge the husband from liability for the torts of the wife committed when he is not present and with which he has no connection. In this State the wife stands upon an equality, in all respects, with the husband. She is alone responsible for her contracts, and should be alone responsible for her words and her acts.

We have examined the various authorities conflicting with these views, but owing to the provisions of our statute we are not inclined to follow them, and therefore think it unnecessary to refer to them.

The judgment of the District Court will be affirmed.

All the justices concurring.

Judgment affirmed.

HUMMER V. LAMPHEAR.

(82 Kans. 439.)

Judgment — domestic — action on.

An action may be maintained on a valid domestic judgment before the time to issue execution has expired.

ACTION on a judgment. The opinion states the facts. The plaintiff had judgment below.

Hummer v. Lamphear.

Hudson & Tufts, for plaintiff in error.

Martin & Orr, for defendant in error.

HORTON, C. J. The facts in this case are as follows: On June 17, 1876, the Perpetual Building and Saving Association recovered in the District Court of Atchison county a judgment against John P. and Matilda W. Hummer for the sum of \$321.08, bearing interest at nine per cent per annum. June 6, 1881, an execution was issued upon this judgment, which was returned wholly unsatisfied as to the Building and Saving Association. On September 13, 1882, the judgment was assigned and transferred to A. H. Lamphear, who is now the owner thereof. On September 28, 1882, an *alias* execution was issued upon the judgment, directed to the sheriff of Jackson county, Kansas, and this execution was also returned unsatisfied. On November 24, 1883, A. H. Lamphear brought his action in the District Court of Jackson county against John P. and Matilda W. Hummer, upon the judgment in favor of the Building and Saving Association of June 17, 1876, and alleged in his petition that the judgment was in full force and effect; that John P. and Matilda W. Hummer had no personal property within the State of Kansas subject to execution, nor the legal title to any lands or real estate in said State, subject to execution; that Matilda W. Hummer was the owner of an equitable interest in a quarter-section of land lying in Jackson county, State of Kansas, the legal title to which was in the State of Kansas, to secure the sum of \$676.30 with interest from June 17, 1882, at ten per cent per annum; that upon the payment of this amount and interest, the State was ready and willing to give a deed or patent conveying the land and the legal title thereto. The prayer of the petition was, that judgment should be rendered against John P. and Matilda W. Hummer for the sum of \$331.08 with interest at nine per cent per annum, and costs of suit; that the sheriff of Jackson county be appointed a receiver to ascertain the interest of Matilda W. Hummer in the land described in the petition; that he take possession of the same and hold it with the rents and profits arising therefrom, subject to the order of the court; and for other and further relief as the court might deem meet and proper.

The defendants, John P. and Matilda W. Hummer, demurred to the petition, upon the grounds — *First*, That the court had no

Hummer v. Lamphear.

jurisdiction of the persons of the defendants, or of the subject of action; *second*, that the petition did not state facts sufficient to constitute a cause of action against the defendants, or either of them. The court overruled the demurrer, and rendered judgment against the defendants for \$546.17, with interest and costs; adjudged the same to be a first and prior lien on whatever interest the defendants or either of them had in the real estate described in the petition, and decreed that if the defendants failed or refused to pay the judgment within a day named, an order of sale issue to sell the property to satisfy the same. To the rulings and judgment of the court the defendants excepted.

It is their contention at this time, that the petition does not state facts sufficient to constitute a cause of action, because upon its face it appears that the judgment sued on was, at the commencement of this suit, in full force and effect, and that execution might have issued thereon, and the equitable interest of Matilda W. Hummer in the real estate in Jackson county taken by execution. Code, §§ 419, 443; Comp. Laws of 1879, ch. 104, § 1, subd. 8. To support this, it is insisted that at common law an action could not be maintained upon a judgment until the time within which an execution might issue had elapsed. *Pitzer v. Russell*, 4 Oreg. 124; *Lee v. Giles*, 1 Bailey, 449; 21 Am. Dec. 476; 3 Bl. Com. (Wendell's ed.) 160.

Counsel say, in their brief: "There are *dicta* in several decisions which would seem to take a contrary view, but we have been unable to find a case where the question was squarely raised, and the decision was that such an action could be maintained at common law until the judgment became dormant or the execution would prove ineffectual. * * * *Burnes v. Simpson*, 9 Kans., decides that an execution can be maintained on a domestic judgment in this State, which is true; but whether it can be maintained when an execution can issue thereon was not raised in that case, and consequently not examined. We claim that that case does not decide the question now raised."

The decision in *Burnes v. Simpson*, *supra*, goes farther than counsel are willing to concede. In that case the judgment was rendered June 4, 1859, for \$3,054 and costs; executions were issued as follows: September 28, 1859; November 28, 1859; January 27, 1860; August 15, 1864; May 2, 1869. All of these were returned unsatisfied. The action on the judgment was commenced June 2,

Hammer v. Lamphear.

1869. Under the law in force at the rendition of the judgment of June 4, 1859, judgments of the District Courts were liens for five years on land and as long thereafter as the judgment should be kept alive by the issue of executions in proper time. Comp. Laws of 1862, Civil Code, §§ 433, 434. The judgment of *Burnes v. Simpson* of June 4, 1859, was in full force and unsatisfied when the action of June 2, 1869, was instituted, as it had been kept alive by the issuance of executions in accordance with the provisions of the statute. Therefore the decision in *Burnes v. Simpson* upon the record in that case decides in effect that an action can be maintained upon a judgment in this State, although the judgment is in full force, and the time within which an execution can be issued has not expired. As counsel have been unable "to find a case where the question was squarely raised and it was decided that such an action could be maintained at common law until the judgment became dormant or the execution would prove ineffectual," we refer to the following authorities:

"Debt lies upon a judgment within or after the year after the recovery." Wheaton Selw. 600.

"By common law, an action could be maintained within a year and a day on a domestic judgment, that being the life of a judgment without issuance of execution." 3 Comyn Dig. 1792, Debt, A 2, 43 Edw. III, 3, 2b.

In *Ames v. Hoy*, 12 Cal. 11, it was insisted by counsel "that as an execution could have been issued on the judgment, no action could be sustained thereon, or in other words that an action of debt will not lie on a judgment if an execution can be issued thereon." Upon this point the court, BALDWIN, J., delivering the opinion, said: "The chief argument is that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true; in fact as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien, and in this case the advantage of having record evidence of the judgment is sufficiently perceptible, the argument that the defendant may be vexed by repeated judgments on the same cause or action, is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt."

In *Greathouse v. Smith*, 4 Ill. (3 Scam.) 541, TREAT, J., in de-

Hummer v. Lamphear.

delivering the opinion of the court, said: "No rule of law is better settled than the one that an action of debt is maintainable on a judgment of a court of record. The judgment is a good cause of action, it being as between the parties the most conclusive evidence of indebtedness. We know of no principle which inhibits the creditor on a judgment which is in force and unsatisfied from recovering in an action brought on it, although he may, at the time of bringing the suit, be entitled to an execution on his judgment. He is at liberty to proceed by execution to collect the judgment, or institute a new action on it. Notwithstanding the second suit may be unnecessary he has the clear legal right to recover, and the courts have no power to prevent him, or impose terms on him for so doing."

In that case Abraham Lincoln, afterward president, appeared as one of the counsel.

In *Davidson v. Nebaker*, 21 Ind. 334, it was decided that "A judgment is a debt of record, and an action will lie to recover it, whether the judgment is foreign or domestic, notwithstanding the plaintiff may have a remedy on the judgment in the court where it was rendered, by execution or otherwise."

In *Hale v. Angel*, 20 Johns. 342, it was held, "Where an execution, issued on a judgment in justice's court, is not returned at all by the constable, the common-law right of the party remains unimpaired and he may bring an action of debt on the judgment." In the opinion it was said: "There are no negative words that a party shall not sue on a judgment until the execution has been returned. The common-law right of bringing an action of debt as soon as a judgment is recovered remains unimpaired. The statute does not give the action of debt, but is merely explanatory of the common-law right."

In *Smith v. Mumford*, 9 Cow. 26, the case of *Hale v. Angel*, *supra*, was referred to and followed.

In *Linton v. Hurley*, 114 Mass. 76, it was held: "An action may be maintained upon a judgment although an execution issued thereupon has not been returned." And in *O'Neal v. Kittredge*, 85 Mass. (3 Allen), 470, it was decided that "A declaration setting forth the recovery by the plaintiff against the defendant of a judgment for a certain sum as damages, and another certain sum as costs, which judgment remains in full force and unsatisfied, whereby an action hath accrued to the plaintiff to have and recover of

Gould v. City of Topeka.

the defendant the balance due thereon and interest, is sufficient on demurrer."

Freeman, in his work on Judgments (3d ed.), section 432, says: "At common law a party has a right of action upon his judgment as soon as it is recovered. This right is neither barred nor suspended by the issuing of an execution; nor because from having the right to take out execution, the plaintiff's action seems to be unnecessary."

Many other cases might be cited supporting the same doctrine, but we think for present purposes the above are sufficient. If the question were a new one in this State the writer of this would prefer to follow *Lee v. Giles*, 1 Bailey, 449, and *Pitzer v. Russell*, 4 Oreg. 124; but the case of *Burnes v. Simpson* is decisive. That decision was rendered in 1872, and it is for the legislature to interpose and provide that such oppressive and vexatious actions shall not be brought, if the rule of the common law as interpreted in *Burnes v. Simpson*, *supra*, is to be changed.

[Minor points omitted.]

The ruling and judgment of the District Court will be affirmed.

Judgment affirmed.

All the justices concurring.

GOULD V. CITY OF TOPEKA.

(32 Kans. 485.)

Municipal corporation — when liable for dangerous plan of streets.

Where a street, as planned and ordered by the authorities of a city, is manifestly and unquestionably dangerous and unsafe, the city is liable for resulting injuries to individuals; but not otherwise, and not without evidence of express adoption or ratification.

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

W. P. Douthitt and G. N. Elliott, for plaintiff in error.

A. B. Quinton and J. D. McFarland, for defendant in error.

VALENTINE, J. This was an action brought by Luella L. Gould against the city of Topeka, to recover damages for personal

Gould v. City of Topeka.

injuries alleged to have been caused, on the night of August 21, 1879, by reason of the unsafe and dangerous condition of a public street in the city of Topeka, named "Kansas avenue." At that time the plaintiff was riding in a carriage on said street, up an embankment which leads to the south end of the bridge which spans the Kansas river, and the carriage was overturned and the plaintiff thrown therefrom and down the embankment on the east side thereof, and the injuries of which she now complains were thereby produced. The only wrong alleged against the city is the construction and permitted existence of the said embankment, which is alleged to be high and narrow, and the negligence of the city in permitting it to remain unprotected and not guarded by any railings or other barriers, and without street lamps or other lights during the night. The case was tried by the court and a jury, and the court gave the following (among other) instructions:

" 13th. It can make no difference in this case whether the made and travelled portion of the street was wide enough to accommodate the ordinary traffic and travel over the same, unless its narrowness was the cause of the plaintiff's being driven over the narrow track, and that such narrowness was caused by the negligent grading and filling of Kansas avenue, at the place where the accident occurred.

" 14th. I further instruct you, gentlemen, that such negligence cannot be predicated upon the plan of a public work, but it may be predicated upon the construction and subsequent management of such a work. If therefore you find from the evidence that the defects complained of in the plaintiff's petition did in fact exist in Kansas avenue, at the place where it is alleged the accident happened to the plaintiff, [and] were defects existing in the plan of grading and filling Kansas avenue, as adopted and executed by the proper authorities of the city, then the plaintiff cannot recover in this action. But if you find from the evidence that such defects [arose] from a negligent and careless construction of the grading and filling, after the plan of construction had been fixed upon, then the plaintiff may recover, provided the injuries complained of were caused directly by such last-named negligence, and the plaintiff and the driver of the team in which she was riding were themselves without fault contributing to such injuries.

" 15th. If you find from the evidence that at the time of the alleged accident, Kansas avenue, at the place where such accident

is alleged to have occurred, was in a defective condition, and that such defective condition was caused by said avenue having got out of repair, either by reason of travel upon it or otherwise, after the completion of the work of grading and filling, and not by reason of negligence in the grading and filling thereof as originally done, then the plaintiff cannot recover in this action.

“16th. If the work of grading and filling Kansas avenue at the place of the accident was done by the direction of the defendant, and after its completion the defendant, with knowledge of the plan on which said work had been done, accepted it by permitting it to stand and to be used as a public street, this would be a ratification of the plan of said work, and would in effect be the same as though the plan of said work had first been adopted, and the work executed in accordance with said plan so adopted.”

Several other instructions were given, but these are the only ones of which the plaintiff now complains. The plaintiff also asked the court to give several other instructions which the court refused, and of this refusal the plaintiff now complains; but we do not understand that any question is now raised upon the instructions refused, different from or in addition to the questions raised upon the instructions given. The jury found a general verdict in favor of the defendant, and the plaintiff moved the court for a new trial upon various grounds, which motion was overruled, and the court rendered judgment in favor of the defendant, and against the plaintiff for costs; and this judgment the plaintiff now seeks to have reversed.

That a city is liable for any injury to private individuals, caused by the negligence of its officers in not keeping its streets in a safe and proper condition, has been maintained and promulgated by the Supreme Court of Kansas nearly ever since its first organization, and such is now the unquestioned doctrine in this State; and nearly all the courts of last resort in all this country also recognize, sanction, approve and promulgate this very same doctrine. It is believed that the decisions of the Supreme Courts of New Jersey, Michigan and Texas furnish the only exceptions to this almost universal agreement among the courts. *Pray v. Mayor, etc.*, 32 N. J. L. 394; *Detroit v. Blakeby*, 21 Mich. 84; s. c., 4 Am. Rep. 450; *McCutcheon v. Homer*, 43 Mich. 483; s. c., 38 Am. Rep. 212; *City of Navasota v. Pearce*, 46 Tex. 525; s. c., 26 Am. Rep. 279.

But it is claimed by counsel for the defendant that municipal

Gould v. City of Topeka.

corporations are endowed with various powers, among which are first those which are discretionary and judicial, quasi-judicial or legislative in their character; and second, those which are mandatory and ministerial in their character; and that while municipal corporations may be held liable for the wrongful exercise or the wrongful failure to exercise those powers which are mandatory and ministerial in their character, such as negligently failing to keep their streets in safe and proper condition, yet that no liability can be incurred by the exercise or failure to exercise those other powers belonging to the first class above-mentioned, as where the city orders or plans a street improvement, or a change or alteration of such street, and the work is done accordingly, even if the exercise of such powers or failure to exercise the same should be ever so wrongful. It is claimed that cities may adopt a plan for public improvements or ratify such plan after the improvements have been made, and the adoption or ratification of such plan will come within the first class of powers above mentioned; that no negligence can be predicated upon the adoption or ratification of such plan, nor upon the improvements themselves if made in accordance with the plan; nor can the city be held liable for any injuries to individuals resulting from the plan, or from the improvements, if made in accordance with the plan, even if the same were ever so defective and dangerous; and it is further claimed that the city can be held liable only for the negligent construction of the public works, or the negligent management and control thereof after the same have been made; and this for the reason that these matters, and these only, can possibly come within the second class of powers above mentioned.

We agree with counsel in their division of the powers of municipal corporations, and generally that cities are not liable for the exercise or non-exercise of the first class of powers above mentioned; but we do not agree with counsel in their application of the rule with respect to injuries to private individuals resulting from the defective and dangerous condition of the public streets of cities. In our opinion, a city has no more right to plan or create an unsafe and dangerous condition of one of its public streets than it has to plan and create a public or common nuisance; and it is admitted that it has no right to do this. 2 Dill. Mun. Corp. (3d ed.), § 660. The rule contended for by counsel for the defendant has been applied to various cases, as follows: It has been applied to

Gould v. City of Topeka.

city improvements, and the cities held not liable, in cases where the property of individuals outside of the street has been flooded and injured on account of the insufficiency of sewers or drains. *City of Atchison v. Challiss*, 9 Kans. 603; *Steinmeyer v. City of St. Louis*, 3 Mo. App. 256; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Darling v. Bangor*, 68 Me. 108; *Child v. City of Boston*, 4 Allen, 41; *Van Pelt v. City of Davenport*, 42 Iowa, 308; s. c., 20 Am. Rep. 622.

The rule has also been applied and a city held not liable in a case where water on adjoining property was polluted by means of a sewer or drain. *Merrifield v. Worcester*, 110 Mass. 216; s. c., 14 Am. Rep. 592. The rule has also been applied and a city held not liable in a case where by the digging of a ditch the rent of a person's house was diminished. *Lambar v. City of St. Louis*, 15 Mo. 610. And also to the same effect where by the digging of a ditch and the construction of a culvert on the sidewalk, the plaintiff's abutting property was damaged. *White v. Corporation of Yazoo City*, 27 Miss. 357. The rule has also been applied and a city held not liable, in a case where a school-child was injured by an unsafe stair-case. *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332. And the rule has also been applied and cities held not liable, in New York and Michigan, where injuries occurred to individuals on account of the unsafe and dangerous condition of the streets. *Urquhart v. City of Ogdensburg*, 91 N. Y. 67; s. c., 43 Am. Rep. 212; *City of Detroit v. Beckman*, 34 Mich. 125; s. c., 22 Am. Rep. 507; *City of Lansing v. Toolan*, 37 Mich. 152.

The Michigan cases however are not entitled to much weight as authority, for the reason that in that State, as before stated, the Supreme Court has gone to the extent of holding that cities are not liable in any case to private individuals for injuries resulting from defective streets, whether the defect arises from the neglect of the city and its officers to keep the streets in safe and proper condition, or is the result of a defect in the original plan adopted by the city council for the construction of the improvements. *Detroit v. Blackeby*, 21 Mich. 84; s. c., 4 Am. Rep. 450; *McCutcheon v. Homer*, 43 Mich. 483; s. c., 38 Am. Rep. 212.

This leaves only the New York case as being entitled to consideration in holding that the rule of the non-liability of cities should be applied where injuries have resulted to individuals on account of the unsafe and dangerous condition of the public streets, so made

Gould v. City of Topeka.

dangerous in accordance with a plan previously adopted by the governing board of the city. But even in New York it was doubted as late as in 1876 whether the rule should be so applied. *Clemence v. City of Auburn*, 66 N. Y. 334. In that case it was doubted whether the city would be liable or not, even if the work had been done in exact accordance with the directions of the common council of the city. And we have the authority of the highest courts of two States, Illinois and Wisconsin, holding that the rule should not be applied in any such cases. *City of Chicago v. Gallagher*, 44 Ill. 295 ; *City of Chicago v. Langlass*, 66 id. 361 ; s. c., 4 Am. Rep. 603 ; *Prideaux v. City of Mineral Point*, 43 Wis. 513 ; s. c., 28 Am. Rep. 558. These cases seem to wholly ignore all distinction made by some courts between injuries resulting from a defective plan of the work and injuries resulting from negligence in the execution of such plan, or in the control and management of the work after its completion ; and they hold that in all cases where injuries occur to private individuals from the unsafe and dangerous condition of the public streets of a city, the city should be held liable ; and this seems to be more in harmony with reason and justice than the other rule. 2 Thomp. Neg. 734, 735, 736, §§ 2, 3, and notes.

In Kansas we have no special reason for following this rule of the Wisconsin and Illinois courts. In Kansas, as well as elsewhere, cities do not own the public streets. In Kansas, the fee-simple title to the streets is vested in the counties in which the cities are situated, and is so vested, not for the benefit of the counties or the cities merely, but also for the benefit of the entire travelling public, and the cities are invested only with the control and management of the streets ; and this control and management is not merely for the benefit of the cities themselves, but is also for the benefit of the entire travelling public. This control of the streets however is not wholly discretionary, or judicial, or quasi-judicial, or legislative, and is not divided or shared with other corporations, boards, or tribunals, but it is absolute and exclusive in the cities ; and as we think, it is not conferred upon them merely as a benefit which they may exercise or not, at their option or discretion, but is imposed upon them also as an absolute and mandatory duty, which they have no right to evade or avoid. Generally, they must keep their streets in a safe and proper condition at their peril. And while we recognize the rule contended for by the defendant's coun-

sel, and think that it may have application in some cases, yet we do not think it has very much room for application where injuries occur to private individuals on account of defective and manifestly dangerous public streets. The control of the streets of cities was not put into their hands for the purpose that they might plan or order that the streets should be made dangerous or unsafe for the public to travel thereon; nor was such control put into their hands for the purpose that they might plan or order that the streets should remain in an unsafe or dangerous condition if previously dangerous; but such control was given to them for the sole purpose that they should make and keep the streets safe and convenient for the travelling public; and we think it was put into their hands as a mandatory duty, which they have no right or discretion to evade or avoid. If a city should plan or arrange that a street should be made unsafe and dangerous, we should be inclined to think that it would so transcend its powers as given to it by the legislature, and so violate its duties as imposed upon it by the legislature, that it would be liable for any injury which might occur to any individual by reason of such unwise action. Such action would be substantially the same as planning and creating a public nuisance. Can a city, by planning that a cistern should be left uncovered in the middle of a public street, avoid all liability for injuries that may occur by reason of some person's falling into it in the night-time without fault on his part, when on the other hand, it would be liable if the cistern were left uncovered by the person who constructed it, or was afterward uncovered by some other person, and notice of its condition had been given to the city officers? Is such a distinction founded in reason? 2 Thomp. on Neg. 734, 735, 836, §§ 2, 3 and notes; id. 766, 767, 768 and notes.

After a careful consideration of this entire question, we have come to the conclusion that where a street as planned or ordered by the governing board of a city is so manifestly dangerous that a court, upon the facts, can say as a matter of law that it was dangerous and unsafe, the rule contended for by the defendant should not have any application, and the city should be held liable; but where, upon the facts, it would be so doubtful whether the street as planned or ordered by the governing board of the city was dangerous or unsafe or not—that different minds might entertain different opinions with respect thereto—the benefit of the doubt might properly be given to the city, or rather to its

Gould v. City of Topeka.

governing board that planned or ordered that the street should be placed in such a condition, and the rule should be held to apply, and the city should not be held to be liable. Before leaving this question, we think we should call attention to the fact that the principal part of the reasoning in those cases above cited which hold that a city is not liable for consequential damages to property situated outside of the streets by reason of sewers, drains, ditches, etc., is not applicable to cases where the injuries are to individuals travelling upon the public streets and where the injuries are caused by some manifestly dangerous thing in or forming a part of the public streets. Nor is the principal part of the reasoning in one of this class of cases like the principal part of the reasoning in the other; for in the one class of cases the city has a legal right to do just what it has done, while in the other it has no such right; and a cause of action can seldom, if ever, be based upon the lawful exercise of an unquestioned legal right, while it may generally be based upon a wrong. See the case of the *City of Atchison v. Challiss*, 9 Kans. 603, heretofore cited, for the reasoning where the city is held not to be liable. We shall now pass to another question.

We would further think that in order that the city should be protected from liability on account of the work being executed in accordance with a plan previously adopted by the city, the plan should be shown to have been expressly adopted, and adopted by the city council or other board having the control of the political, the legislative and the governmental affairs of the city. To say that it has been adopted because the board has given no expression to the contrary, would not do. In order that the city should be protected from liability it is necessary that its board should have the exact matter under consideration, and after due deliberation should expressly order that the thing be done; or if the thing has already been done, then that it should be ratified. Suppose that the city council should order that a cistern be constructed in some public street, and say nothing about the cover; we would think that it should not be held that the want of a cover should be included as a part of the plan in constructing the cistern; or in other words, that the city council had planned that there should be no cover; and if the cistern were built in accordance with the order of the board, but with no cover, and injuries should result because thereof, we would think that it

should not be held that the city was not liable for the injuries. Or if the city should order that a high and narrow embankment with precipitous sides should be made in a public street for the purpose that the travel should pass over the embankment, and should say nothing concerning railings, guards or other barriers, and nothing concerning street lamps or other lights to prevent persons in the night-time from falling or driving off the embankment and thereby being injured, we would think that it should not be held that the city had planned or ordered that no such railings, guards, barriers, lamps or lights should be used; but we would think that it should be held that the city had made no order with reference thereto; and then we would further think that if no such railings, guards, barriers, lamps or lights were used, and thereby injury should result, the city should be held to be liable. Before the court should hold that a street manifestly unsafe and dangerous was so planned and so ordered by the governing authorities of the city, the courts should be able to say from the city records that it was so planned and so ordered by the city authorities. There should be no presumption that the city authorities ordered or planned that a public street should be dangerous. If a cistern or an area within the sidewalk should be left uncovered and remain so for a long time, it should not be presumed or held that such authorities adopted the plan that it should remain uncovered, although it might be proved that all the city authorities had knowledge of the same. Or if a part of a bridge over a deep stream with precipitous banks should be partially washed away, still leaving it possible in the day-time for teams to cross with great care, but dangerous and hazardous in the night-time, and no precaution should be taken by the city authorities to guard against danger, it should not be presumed or held that the city authorities, in their legislative or judicial capacity, or even as an exercise of their discretionary powers, had planned or ordered that the bridge or stream should so remain in its hazardous and dangerous condition. Courts should not allow any but the most formal evidence to be introduced to prove that the city authorities had planned or ordered or ratified any such dangerous place within their streets. Courts should not presume, without formal proof, that the governing board of a city had deliberately done wrong, and especially not for the purpose of relieving the city from the consequences of a wrong for the doing of which it would be held to be not liable if it had done the wrong delib-

In Matter of Dill.

erately, but liable if it had done it merely heedlessly or carelessly.

We think the court below erred in giving the foregoing instructions. There was no evidence showing that the city, by its council or otherwise, had ever expressly planned or ordered that the street where the plaintiff's injuries occurred should be made or left in the condition in which it then existed; and the evidence does not show that the city, by its council or otherwise, ever expressly ratified any such condition of the street. The only evidence upon this subject was that the street had remained in that condition for some years, and that the mayor and two members of the city council had knowledge of its condition.

The judgment of the court will be reversed, and the cause remanded for a new trial.

All the justices concurring.

Judgment reversed.

IN MATTER OF DILL.

(22 Kans. 608.)

Contempt — forfeiture of recognizance.

Where one accused of crime forfeits his recognizance to appear for trial, he is not guilty of contempt.

HABEAS corpus. The head-note states the point.

Hatton, Ruggles & Parsons, for petitioner.

W. A. Johnston, attorney-general, and *Edwin A. Austin*, of counsel.

HURD, J. [Omitting other points.] Do the facts found by the court and embodied in the judgment constitute a contempt of court? The substance of the charge and facts found is that the petitioner was under a recognizance to appear in court for trial upon criminal charges pending against him therein; that he did not appear during the term to which he was recognized, and absented himself from the county and kept himself so that he

could not be found by the officers of the court, intending thereby to obstruct the court in proceeding with his trial.

To constitute a direct contempt of court there must be some disobedience to its order, judgment or process, or some open and intended disrespect to the court or its officers in the presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings, or with the administration of justice.

To constitute a constructive contempt of court, some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice, or bring the court or judge or the administration of justice into disrespect.

The petitioner violated no order, direction or judgment of the court, nor was he at large by direction or order of the court. He had entered into a recognizance, as the statute permitted him to do by which he bound himself to the State, to appear in court at the time and term of the court stated in the recognizance, and submit to a trial of the criminal charges therein pending against him. He did not appear in the court as required by the recognizance, and absented himself from the county in which the court was held. The extent of his offending was in not appearing in court and submitting to the trial as he had bound himself to do by the recognizance, and in absenting himself from the county where the court was held. The statute (Comp. Laws of 1879, chap. 82, § 65) provides that when a person under recognizance in any criminal proceeding shall fail to perform the condition of such recognizance, his default shall be recorded and proceedings entered upon the recognizance, and this entry must necessarily be made and these proceedings be taken under the direction of the court, and so far as the statute provides, the authority of the court to direct proceedings then ends. The only penalty imposed by law on the petitioner for his non-appearance, pursuant to the terms of the recognizance, was the forfeiture and prosecution of the recognizance. We think that his non-appearance in court during the term for which he was recognized to appear, and his absenting himself from the county, were not a contempt of court, and that the charge against him on which he was convicted and is now imprisoned did and does not constitute such an offense as renders him liable to punishment beyond the punishment provided by the statute; and as there was no offense, there could be no lawful conviction, and the court had no jurisdiction to render any legal judgment, and

In Matter of Dill.

the judgment rendered is void, and the imprisonment of the petitioner under it is unlawful.

The only case within our knowledge bearing upon the question whether the acts or omissions of the petitioner were a contempt of court is *Ingle v. State*, 8 Blackf. 574. In that case a party was indicted and bound by his recognizance to appear and answer the charge. He was advised by an attorney "that if he could not procure a continuance on affidavit, he could escape and forfeit his recognizance, which would work a continuance of the cause to the next term, at a trifling cost." *Held*, that the attorney, for giving such advice, was not guilty of a contempt of court. If an attorney, who is an officer of the court, can give such advice and not be in contempt, surely the client who acts upon the advice cannot be guilty, and if the accused under such circumstances, certainly a party whose only offense is absenting himself from the court on his own volition, cannot be guilty of a contempt of court.

The petitioner could have taken proceedings in error in this court, and thereby relieved himself from this void judgment and illegal imprisonment, but that is not his only remedy. The proceedings by *habeas corpus* are proper, and he is entitled to be discharged from imprisonment under them.

The order is, that the petitioner be discharged from the arrest and imprisonment of which he complains in his petition for the writ issued.

Judgment affirmed.

HORTON, C. J., and VALENTINE, J., concur in the conclusion.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

LEARNED V. TILLOTSON.

(97 N. Y. 1.)

Evidence — estoppel by omission to answer letter.

A letter written by one party to a transaction to the other party, after the transaction, giving his version of it, and not answered by the other party, is not competent in evidence against the latter as an admission.

ACTION for accounting. The opinion states the point. The defendant had judgment below.

Robert Stickney, for appellant.

Joseph H. Choate, for respondent.

MILLER, J. [Omitting other points.] Upon the trial at Special Term objection was made to the introduction in evidence of a letter from the plaintiff to the defendant, dated the 2d day of December, 1878, and the letter was excluded, except for the purpose of showing a demand by the plaintiff of the defendant of the stock claimed to belong to the plaintiff. This same letter was received in evidence upon the first hearing against the objection of the defendant, and

Learned v. Tillotson.

an exception taken to the ruling. The letter in question contained a statement of the plaintiff's claim against the defendant, and it is insisted that it was admissible as a part of the *res gestæ*. If the letter was competent it must be on the ground that it was a statement made by the plaintiff, which called for a response from the defendant, and none having been given, the silence of the defendant, and his failure to make any reply to the same was an admission of the accuracy of the statement made in the letter. The letter itself cannot be regarded as coming within the rule that where a statement is made at the time when credit is given, as in an action for falsely representing the solvency of a stranger, proof may be given that the plaintiff trusted him in consequence of the misrepresentation, or as evidence of declarations in kindred cases accompanying the acts done, which constitute a part of the *res gestæ*. Taylor Ev., § 585; *Beaver v. Taylor*, 1 Wall. 637; *Milne v. Loisler*, 7 H. & N. 786, 796.

The letter containing the statement as to the transaction was written long after the alleged agreement was entered into, and cannot well be regarded as accompanying and constituting a part of the same. It was evidently an after-thought, intended to draw from the plaintiff, in response, a statement of his version of the transaction, and the evidence cannot be justified upon the ground that it was in the nature of a conversation had after the contract had been made, which contained statements as to what had taken place at the time of the original contract, and hence was a part of the *res gestæ* within some of the authorities cited by the appellant's counsel. The statement was entirely *ex parte*, not made in the presence of the defendant, and therefore he was not in the position of one to whom a conversation is addressed, who is called upon at the time to make an answer to the same, or to suffer the consequences of such inferences as may be derived from the fact of his remaining silent, and thus acquiescing in the correctness of the representations made. Nor can it be said, we think, that the statement contained in the letter bears any analogy to a case where an injured party makes a statement after the transaction, which is held, under certain circumstances in some of the authorities, to be competent testimony.

Some of the cases cited, to establish the admissibility of declarations in favor of or against the party making them, relate to the question of intent, and have no application to the case at bar.

Ridley v. Gyde, 9 Bing. 349; *Thorndike v. City of Boston*, 1 Metc. 242.

Other authorities are cited to sustain the position that the letter, taken in connection with the defendant's silence, and the subsequent interviews between the parties, was evidence, on the ground that it tended to establish an admission by the defendant. These cases have been examined, and we think none of them present the precise question now considered. In *Keen v. Priest*, 1 Fost. & Fin. 314, the letter then in question was from the plaintiff's attorney to the defendant, demanding redress for "an illegal seizure of sheep," and it was admitted on the ground that it was evidence of the conduct of the defendant, of which silence was sometimes evidence. It will be seen that the case was one of a tortious nature, and in this respect differs from an action upon a contract, where the letter is offered to show the plaintiff's version of the contract and its admission by the mere silence of the defendant.

In *Roe v. Day*, 7 Carr. & P. 698, the letter introduced was the last of a written correspondence, and was competent for the purpose of showing all that passed between the parties. In *Gaskill v. Skene*, 14 Q. B. 664, the letter was received in evidence, as being, in substance, a demand, and containing only such statements as might fairly accompany a demand. The remarks of COLERIDGE, J., evince that a mere *ex parte* statement in a letter, of the party's case, cannot be received as evidence upon the ground that it remains unanswered.

In *Fenno v. Weston*, 31 Vt. 345, the letter in question was introduced in evidence without objection, and constituted a portion of the correspondence between the parties, and the question in reference to it was raised in regard to the charge of the judge. The precise point now made was not presented. There were no letters passing between these parties which authorizes the admission of the letter objected to as a part of the correspondence, and it does not appear that the defendant ever wrote to the plaintiff, or had any communication with him on the subject except of an oral character. In *Allen v. Peters*, 4 Phila. 78, the decision was based on the ground of a misdirection, or a want of full direction in the charge, and the question whether the letter was properly admitted was not decided, and there is nothing in the opinion of the court which sustains the admissibility of a letter of the character of the one which was excluded under the facts presented in the case at

Learned v. Tillotson.

bar. Nor can it be said, we think, that the letter was answered in the subsequent conversation between the parties, which was given in evidence upon the trial, so as to render the letter admissible. Some other cases are cited by the appellant's counsel, but none of them hold that a letter, written under the circumstances presented here, is competent evidence, of itself, against the party to whom it is addressed. On the contrary, numerous authorities sustain the position that a letter written long after the transaction has taken place stating the facts relating to the same, and the agreement of the parties, under ordinary circumstances is a mere declaration of the party in his own behalf, which does not demand an answer, and that the silence of the party cannot be considered as an admission of the truth of the statement made, and as binding upon him.

The question here discussed has been the subject of consideration in a recent decision of this court. *Talcott v. Harris*, 93 N. Y. 567, 571. In that case the action was against a person who had been discharged in bankruptcy, and it was claimed that the discharge was invalid on the ground that there was fraud in the contract by the bankrupt. An order of arrest had been issued upon affidavits averring fraud in contracting the debt, and upon the trial the plaintiff introduced in evidence, against the objection and exception of the defendant, the papers upon which said order was granted. This court held that the evidence was erroneously received, and reversed the judgment. It was laid down in the opinion that "if the affidavits in question were competent evidence, it must be upon the ground that they were statements made by or on behalf of the plaintiff, showing the fraud of the defendants, which were uncontradicted by the defendants, and that they acquiesced in the propriety of the order and in the truth of the statements. * * * While a party may be called upon in many cases to speak where a charge is made against him, and in failing to do so may be considered as acquiescing in its correctness, his omission to answer a written allegation, whether by affidavit or otherwise, cannot be regarded as an admission of the correctness thereof, and that it is true in all respects. Reasons may exist why he may choose and has a right to remain silent and to vindicate himself at some future period, and on some more opportune occasion." We are unable to see why the case cited is not directly in point. The affidavits constituted a statement by the plaintiff, which was not contradicted, no motion having been made to vacate the order of

arrest, upon the ground that the facts were not true, and no exception having been taken to the same. The facts are very similar in reference to the letter of the plaintiff in the case at bar, and if silence could be regarded as an admission of the correctness of the statement made, the same rule is applicable to each case, and the decision last cited is controlling. Numerous other cases tend in the same direction. *Waring v. U. S. Tel. Co.*, 4 Daly, 233; *Anthoine v. Coit*, 2 Hall, 40; *Robinson v. Fitchburg & W. R. Co.*, 7 Gray, 92; *Hill v. Pratt*, 29 Vt. 119; *People v. Lockwood*, 3 Hun, 304; *Fairlie v. Denton*, 3 Carr. & P. 103; *Draper v. Crofts*, 15 Mees. & Wels. 166; *Meguire v. Corwine*, 3 MacArth. 81.

From an examination of the cases, we think that a distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law. We think that the court, on the trial at Special Term, properly held that the letter was inadmissible for the purpose of showing a demand, and that the judge, except upon the previous trial of the issue which was submitted to the jury, erred in receiving the same in evidence.

There was no error in any of the findings of the court upon the trial, and the judgment should be affirmed.

Judgment affirmed.

All concur, except DANFORTH, J., absent.

City National Bank of Poughkeepsie v. Phelps.

CITY NATIONAL BANK OF POUGHKEEPSIE v. PHELPS.

(97 N. Y. 44.)

Bank — National — changed from State — guaranty.

A National bank, changed from a State bank, may maintain an action on a continuing guaranty for loans, held by it before the change, for loans both before and after the change.

ACTION on a guaranty. The head-note and opinion show the point. The plaintiff had judgment below.

Edward S. Clinch, for appellant.

H. A. Nelson and *W. Farrington*, for respondent.

RAPALLO, J. On the former appeal in this case, 86 N. Y. 484, we decided that the plaintiff was entitled to recover of the defendant so much of the indebtedness of Woodruff to the City Bank, as was incurred before that bank reorganized as the City National Bank, and as remain unpaid. The same points were raised on that appeal, which are now urged by the appellant, so far as the indebtedness above referred to is concerned, and in that respect there was no material change in the facts on the second trial.

The question of the liability of the defendant for indebtedness incurred by Woodruff after the City Bank reorganized as a National bank was not decided, nor necessarily involved, on the former appeal. The judgment then under review was one of nonsuit, and if the plaintiff had a right of action for any part of his demand, that was sufficient to require a reversal without regard to the amount recoverable. The case was therefore decided on the ground that even if it should be conceded for the time that the City National Bank could not make fresh advances to Woodruff and hold the defendant liable on the guaranty, he was liable at all events for the sums advanced by the City Bank, the obligations for which had been renewed, with the defendant's consent, by the City National Bank which succeeded to all the rights of the City Bank.

On the present appeal, the point which was thus left undecided is distinctly and directly presented. On the second trial the plaintiff recovered the amount of three notes given by Woodruff to the

City National Bank of Poughkeepsie v. Phelps.

City National Bank, viz., one of \$500, one of \$250 and one of \$1,400. The first two, amounting to \$750, were shown to have been given for a balance remaining unpaid, of the original advances made to Woodruff by the City Bank under the guaranty, and they consequently are covered by the decision in the former case. But the origin of the \$1,400 note was not thus traced, and the evidence was to the effect that it was given for a balance remaining unpaid on a note for \$2,000 discounted for Woodruff by the City National Bank July 26, 1869, after the reorganization, which had been reduced by payments, and renewed from time to time down to January 17, 1876, when the last renewal was given for \$1,400, payable four months after date. In respect to this note, the judge on the trial charged the jury that the guaranty of Phelps & Kingman, which was a continuing guaranty, continued, and that the bank had a right to advance upon it to the extent of \$5,000, so long as the firm of Phelps & Kingman existed, or so long as the bank holding the guaranty and acting upon it had no notice of the dissolution of this firm. And he further charged that when the change was made from the City Bank to the City National Bank whatever debt was due upon that guaranty, vested in the City National Bank. Thus far the charge conformed to the decision of this court before referred to ; but the judge went on to charge further that the guaranty continued so that the City National Bank could continue to advance upon it so long as it had no notice of the dissolution of the firm of Phelps & Kingman. If this position is sustained, the \$1,400 note stands upon the same footing as the notes of \$500 and \$250, and the reorganization of the City Bank, in pursuance of the National Banking Act, becomes immaterial to the present controversy.

In regard to this point FOLGER, J., in his opinion in the former appeal, says, 86 N. Y. 490 : "As we view the case we need not pass upon the full scope of the point that the City National Bank cannot hold the defendant upon the obligation to the City Bank. The point, in its extent, rests upon the proposition that the plaintiff is a distinct corporation from the State City Bank ; that they are distinct parties, and that the obligation of a surety to one party may not be availed of by another party. That this proposition applies to the change made by the City Bank from State to Federal jurisdiction, is not so easy of concession or refutation as it may seem at first sight."

The question was thus left open, and the case disposed of with-

Stroher v. Elting.

out regard to it. But it now becomes necessary to determine it, and on consideration we have come to the conclusion that it should be determined in accordance with the view expressed by the judge upon the trial, and by GILBERT, J., in his opinion in this case at General Term, 16 Hun, 158. The general scheme of the National Banking Act is that State banks may avail themselves of its privileges and subject themselves to its liabilities, without abandoning their corporate existence, without any change in the organization, officers, stockholders, or property, and without interruption of their pending business or contracts. All property and rights which they held before organizing as National banks are continued to be vested in them under their new status. Great inconveniences might result if this saving of their existing assets did not include pending executory contracts, and pending guarantees, as well as vested rights, of property. Although, in form, their property and rights as State banks purport to be transferred to them in their new status of National banks, yet in substance there is no actual transfer from one body to another, but a continuation of the same body, under a changed jurisdiction. As between it and those who have contracted with it, it retains its identity, notwithstanding its acceptance of the privilege of organizing under the National Banking Act.

[Omitting other points.]

The judgment should be affirmed.

Judgment affirmed.

All concur.

STROHER V. ELTING.

(97 N. Y. 103.)

Negligence — joint enterprise.

Defendant furnished team, wagon, etc., for carrying passengers, and McCann gathered the passengers and collected the fares, and the two divided the receipts in an agreed proportion. Plaintiff, while walking in a street, was run over by the team and wagon, negligently driven by McCann, defendant not being present. *Held*, that this action of damages would lie.

ACTION of personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Lewis E. Carr, for appellant.

John W. Lyon, for respondent.

DANFORTH, J. The plaintiff, while walking in a public street in the village of Port Jervis, was knocked down and run over by a team of horses and wagon belonging to the defendant. He was injured, and brought this action to recover compensation for the damages sustained. The plaintiff had a verdict, which the Special Term refused to set aside, and judgment followed in his favor. It was affirmed by the General Term.

The case shows that the defendant was not present at the collision, and upon appeal to this court the only question raised is, whether the learned trial judge erred in holding as matter of law that he was liable for the driver's negligence. There was no dispute as to the facts. The team was owned by the defendant, its driver was one McCann, the business transacted with it was the carriage of passengers, and the defendant testifying in his own behalf concerning the relation between McCann and himself said, in substance, that the arrangement was that he would furnish the team and equipments and take care of them, and McCann gather the passengers and collect their fares which were to be divided in the proportion of three-quarters to himself and one-quarter to McCann. In face of these facts the appellant contends that the relation was not that of master and servant, which may be conceded, and also argues that there was no partnership between them, and assuming that to be so, insists that there can be no liability on the part of one for the other's act, and we must hold that way or the appeal fails.

It is clear however that there was a contract relation between them. They undertook to engage together in a money-making occupation, to which one contributed as capital the horses, harness and wagon, and food and care for the team, and the other his personal services. The reward of each was to be derived from the avails of the business as such, and not by way of compensation either for services or use of property. As to third persons therefore, within rules too well settled to permit discussion, each became the agent of the other in the prosecution of the common enterprise, and liable for his omissions and faults in regard thereto. *Champion v. Bostwick*, 18 Wend. 175; *Legget v. Hyde*, 58 N. Y. 272; s. c., 17 Am. Rep. 244; *Roberts v. Johnson*, 58 N. Y. 613.

First National Bank of Oswego v. Dunn.

The learned counsel for the appellant also claims that the court should have directed the jury to inquire whether McCann was, at the time of the injury complained of, in a separate, independent business. Such fact had no evidence for its support, and it would therefore have been error to submit it as one which might nevertheless be found.

We think the judgment should be affirmed.

Judgment affirmed.

All concur.

FIRST NATIONAL BANK OF OSWEGO v. DUNN.

(97 N. Y. 149.)

Execution — levy on replevied chattel.

A replevied chattel in possession of the sheriff is not liable to execution against the same defendant in another action.*

PROCEEDINGS to stay execution. The head-note states the point. The General Term reversed the Special Term order for a stay.

Louis Marshall, for appellant.

S. C. Huntington, for respondent.

FINCH, J. If the General Term were right in sustaining the levy upon the property held under the writ of replevin, the sheriff occupies a very awkward and anomalous position, and the law is made to demand a seeming impossibility. The sheriff took possession of the malt in obedience to process requiring him to take that specific property. The defendants in replevin, Dunn and Dorsey, not giving a bond for the return of the property within the prescribed three days, it became the imperative duty of the sheriff to deliver such property to the First National Bank of Oswego, the plaintiff in the action. While preparing to make such delivery, but before it had been actually accomplished, the Second National Bank of Oswego issued to him an execution against Dunn, and required him to levy upon the same property. He made the levy,

* See *Hardy v. Tilton* (68 Me. 195), 28 Am. Rep. 84.

First National Bank of Oswego v. Dunn.

and so found himself at one and the same instant required to deliver up the malt on one mandate and retain and sell it on another. He cannot do both. The two duties, each equally imperative, are utterly inconsistent, and the performance of either inevitably involves the non-performance of the other. The difficulty too does not end with the sheriff, but extends to the plaintiff in replevin. He sues Dunn to recover the identical property, claiming to be its owner, and obtains for the safety of his title a lawful possession. But that safety is weak and brittle if Dunn can confess a judgment to a creditor, who alleging his debtor's ownership, can again put in jeopardy the possession of the property. The law compels the plaintiff in the replevin, as the price of his temporary possession, to give a bond for the return of the property, if such return is in the end adjudged, and yet if levies may be made in behalf of creditors, the law prevents the very return which it at the same time requires. It was a similar inconsistency to which the Federal court called attention in *Hagan v. Lucas*, 10 Pet. 404. Justice McLEAN said: "If the property be liable to execution a levy must always produce a forfeiture of the bond. For a levy takes the property out of the possession of the claimant and renders the performance of his bond impossible. Can a result so repugnant to equity and propriety as this be sanctioned? Is the law so inconsistent as to authorize the means by which the discharge of a legal obligation is defeated, and at the same time exact a penalty for the failure?"

From these inconsistencies there must be some avenue of escape. The right of the Second National Bank, as a judgment-creditor of Dunn, to contest the validity of his assignment to Dorsey, and the alleged title of the First National Bank by virtue of its warehouse receipt, is undoubted. Claiming the malt to be in truth the property of Dunn, it may levy upon it and seek to maintain its hold, unless met by the obstruction of an existing custody of the law. That obstruction the appellant interposes, and asserts it to be effectual whether at the moment of the attempted levy the malt was in the custody of the officer, or had been delivered to the temporary possession of the bank during the pendency of its proceedings in replevin. The precise question does not seem to have been decided by any court of last resort, but the authorities approach it from several directions, and indicate the principles which should govern its determination. The old action of replevin and its

First National Bank of Oswego v. Dunn.

modern substitute are alike in the nature of proceedings *in rem*. The court fastens upon the identical property, and holds it subject to its own ultimate disposition. If by its own rules it cannot hold the *res* against other process which it has power to control, the action loses its character and becomes merely one for damages. In *Hagan v. Lucas, supra*, it was ruled that the property taken on the writ is in the custody of the law, both while held by the officer, and after delivery to the plaintiff, and so remains during the pendency of the action awaiting the final disposition of the court. And it was further said that this custody could not be disturbed by any process, especially not by that emanating from another jurisdiction. This case, and its doctrine as stated, were approved by the same court in a very recent decision. *Covell v. Hyman*, 111 U. S. 176. It is true, as the General Term say, that the case cited was one in which the writ under which a bond was given for the return of the property was issued from the State court, while the disturbing execution came from the Federal court, and the avoidance of a conflict of jurisdiction was assigned as the principal ground of decision. But at the foundation of that conflict was the inconsistency of a legal requirement that an officer should hold the property for one purpose and yet be compelled to surrender it for another. That the hostile mandates came from different courts only emphasized the inconsistency.

It was early held, and has been steadily maintained, that property levied upon by an officer, when found in and taken from the possession of the defendant in the execution, cannot be replevied unless in a case where the taking was tortious, and the officer liable in trespass. *Thompson v. Button*, 14 Johns. 86; *Pangburn v. Patridge*, 7 id. 142. And that illustrates the difference between a taking on execution and on a writ of replevin. In the former case he is required to take only the property of the debtor, and is a trespasser if he takes that of a stranger; but in the latter he is required to take certain specific property, and is not a trespasser, and cannot be sued for taking it. His possession under the writ and his power to obey it are thus perfectly protected, and his taking is entirely unaffected by the question of ownership.

In *Acker v. White*, 25 Wend. 614, the property was levied upon in 1837 as the property of Jessup. Thereafter White took out a writ of replevin and gave the necessary bond, but left the property in the possession of Jessup. In 1839 Acker, as sheriff, levied upon

the same property, while the replevin suit remained undecided. White recovered the property from Acker, the court saying that "the bond was substituted for the goods," and "assuming that the plaintiff acquired, by virtue of the bond and replevin, the property in question, then though it still continued in the possession of Jessup, it would not be subject to execution against him."

The case of *Burkle v. Luce*, 1 N. Y. 163, cited by the General Term, decided only that where the replevin suit had abated, and could not be revived because of the death of the plaintiff, the levy made by the sheriff, from whose possession the replevin had taken the property, at once revived, and he could re-take it from the possession of the plaintiff's executors. There the replevin was at an end, and the custody of the law discharged. We fail to find anywhere authority for the doctrine that by the issue of an execution a sheriff holding property under a writ of replevin can be forced to disobey the mandate of the writ. The case of successive executions issued to the same officer stands upon different principles. Even there, it is said, that having levied under the first execution, he cannot and does not levy under the second, but its issue to him operates as a constructive levy. *Seymour v. Newton*, 17 Hun, 30. But in such case he is not charged with inconsistent duties, or his lawful possession disturbed. The later executions in no manner alter or interfere with his duty under the first. He can obey all the mandates, and is not driven to disobey any, but an execution following a writ of replevin sets the officer at once at war with himself.

The Code has made provision for the case of a claimant whose claim existed prior to the replevin (§ 1709), but has made none for a case where, as here, the creditor's judgment was obtained and his execution issued after the replevin. In such case he can only claim through the title of the debtor. If there be none in him, there can be no right of the creditor. If that title is already in dispute, he must abide its issue; or if need be, in a lawful manner take part in its determination. If the property be lawfully removed from the possession of his debtor, and held by the law for a final adjudication, he cannot disturb that custody, or invade it with inconsistent process. He must take such remedy as will not interfere with the custody lawfully acquired and maintained. Cases of attachment furnish an illustration. The duty of an officer to whom the warrant has been issued is to take and retain the property till

First National Bank of Oswego v. Dunn.

final judgment and execution. Hence it is said that property *in custodia legis* cannot be attached. Drake Attachments, § 251. And the case of *Read v. Sprague*, 34 Ala. 101, is cited. There an attachment was placed in the hands of the sheriff, and before its levy a writ of seizure from a Court of Chancery was issued to the same officer. He tried to execute both. Of course he could not, and the court held that since he could not execute the attachment except by taking the property, and the moment he took it the property was in the custody of the court under the writ of seizure, therefore the attachment could not be levied. If the courts of this State have modified this rule, it is only in a manner which preserves its substantial elements. In *Dunlop v. Patterson Fire Insurance Co.*, 74 N. Y. 145; s. c., 30 Am. Rep. 283; money deposited with the clerk of a court, in lieu of an undertaking on appeal, was held liable to an attachment in an action by a third person against the depositor. But this went upon the ground that the attachment operated not upon the money itself, but upon the intangible right of the depositor to so much of it as might remain after the exigencies of the appeal were satisfied; and the court carefully and sedulously guarded itself against a construction that would interfere with the custody of the fund.

The creditor, in the present case, must pursue a remedy consistent with the sheriff's duty under the replevin, and with the hold which the law has upon the property. The issue of his execution gave him a general lien against the property of his debtor. He meets with an obstruction to his levy. We see no reason why he may not proceed in equity, making all the rival claimants parties, preventing if need be a transfer of the property by the plaintiff in replevin, avoiding a multiplicity of suits, and so determining in one action the whole controversy. We think the Special Term was right in setting aside the levy.

The order of the General Term should be reversed, and that of the Special Term affirmed, with costs.

Ordered accordingly.

All concur, except RUGER, C. J., taking no part.

VOL. XLIX — 66

PRINGLE v. LEVERICH.

(97 N. Y. 181.)

Partnership — retiring partner — evidence — admission of remaining members.

In an action against a retired partner for a debt contracted by the remaining members, in the same firm name, on the ground of the want of notice or knowledge of the dissolution, the account as entered on the ledger of the new firm is not evidence against the defendant.

ACTION on account. The opinion states the fact. The plaintiff had judgment below.

John E. Parsons, for appellant.

Albert Stickney, for respondent.

EARL, J. Previous to August 11, 1874, the defendants, Charles D. Leverich, Edward Leverich and Stephen D. Leverich, were co-partners, doing business in the city of New York, under the firm-name of Leverich & Co. For some years prior to that day the plaintiff's assignor, John J. Pringle, was a dealer with the firm and was then indebted to it. On that day the firm was dissolved and Charles D. Leverich retired therefrom and never thereafter had any connection therewith. The remaining members of the firm continued to carry on the same business under the same firm-name until 1878 when they became bankrupts. John J. Pringle, after the dissolution of the old firm, continued to deal with the new firm, and at the time of its bankruptcy, in 1878, the latter firm was indebted to him in the sum of about \$15,000. His claim for that amount he assigned to the plaintiff, and he brought this action against the members of the old firm, seeking to hold them for the debt on the ground that his assignor had received no notice and had no knowledge of the dissolution thereof. Charles D. Leverich, the present appellant, defended the action upon the ground that he had retired from that firm, and that the plaintiff's assignor had knowledge of such retirement. Upon this appeal his counsel has brought to our attention various alleged errors for which he seeks to have the judgment reversed; but as we have reached the conclusion that one of the allegations of error is well founded, we will at this time take no notice of the others.

Pringle v. Leverich.

Upon the trial for the purpose of proving the amount of his claim, the plaintiff called as a witness Stephen D. Leverich, one of the defendants, who produced a book and testified that it was the ledger of the firm of Leverich & Co., composed of himself and Edward Leverich. He was then asked this question: "What was the amount of the indebtedness of the firm of Leverich & Co. to John J. Pringle on February 15, 1878, as shown by this book?" This question was objected to by the counsel for Charles D. Leverich, upon the ground that it appeared that he was not a member of the firm of Leverich & Co. at the time in question. The objection was overruled by the court and an exception was taken to the ruling. The witness answered: "On February 15, 1878, the firm owed John J. Pringle \$14,966," and this was the only evidence given of the amount of the plaintiff's claim.

The entries in the book were not used as memoranda to refresh the memory of the witness, but they were received as original evidence, and the question is, whether as such they were properly received? In considering this question we must assume that the plaintiff's assignor did not during the time he dealt with Leverich & Co. have any notice of the retirement of Charles D. Leverich from the firm. The claim of the plaintiff is, that as he did not have such notice, as to him, Charles D. Leverich was to be treated as a member of the firm for all purposes.

During the continuance of a firm the law of agency mainly, although not exclusively, governs the relations of its members to each other and to the persons who deal with it. One partner is the general agent of the firm to bind it in all matters pertaining to the business carried on by the firm. The rule may also be stated that as to himself he acts as principal, and as to his partners he has a general agency to bind them in all matters of the firm.

A partner who retires from a firm may be held liable to all persons who had previously dealt with it and who continued to deal therewith until they have notice or knowledge of his retirement. In *Parsons on Partnership* (2d ed.), 427, it is said: "The reason of the rule is perfectly obvious. They whom he authorizes to think him a partner may hold him as such; and being a partner, and being known as a partner, he authorizes all to think him so who do not know that he has ceased to be one. If we suppose no fraud on his part, there is negligence on his part, and of two innocent persons he should suffer whose negligence caused the

error." In Story on Partnership (7th ed.), § 160, it is said: "Where an ostensible or known partner retires from the firm, he will still remain liable for all the debts and contracts of the firm, as to all persons who had previously dealt with the firm, and have no notice of his retirement. This is a just result of the principle that where one of two innocent persons must suffer from giving credit, he who has misled the confidence of the other, and has been the cause of the credit, either by his representations, or his negligence, or his fraud, ought to suffer instead of the other."

It is thus seen that the reason for holding one who has retired from the firm in such case is based either upon the law of estoppel *in pais*, or upon the rule which is frequently applied, that where one of two innocent parties must suffer, he should suffer who by his fraud or by his negligence has induced confidence or action on the part of the other party. But the reason for holding the retired partner goes so far only as to make him responsible to innocent persons who continue to deal with the firm, presumptively on the faith of his presence as a member thereof; and all obligations to such persons created in such dealings bind the retired partner just as fully and thoroughly as if he continued to be a member of the firm. The rule thus defined goes far enough to protect the former dealers with the firm. After a dissolution of a firm by the retirement of one of the members thereof, it is well settled that the surviving members cannot bind him by their admissions (*Brisban v. Boyd*, 4 Paige, 17; *Walden v. Sherburne*, 15 Johns. 409); and it matters not whether the dealer to whom the admissions were made knew of the dissolution or not. It is sufficient that at the time the admissions were made the parties making them had no right to bind, represent or act for the partner who had retired. In *Whitman v. Leonard*, 3 Pick. 177, the following language was used by PARKER, C. J.: "It is said however that as to a person accustomed to deal with the partnership, it continued until he had notice of the dissolution; but that must apply to their usual dealings."

It does not appear when these entries in the ledger were written, or that they were part of any transaction between the plaintiff's assignor and the firm, or that they were the result of any settlement then made between him and the firm. Nothing appears about them except that they were in the ledger of the firm. They may have been written there after the plaintiff had ceased to deal with the firm, or after he had notice of the dissolution, or after the

Dillenbeck v. Dygert.

bankruptcy of the firm. They were evidently written after the dealing had ceased, as they contained the entire balance of the plaintiff's claim. They were therefore at most the bare, naked declarations or admissions of the firm as it was then constituted, made four years after Charles D. Leverich had retired therefrom. They can therefore have no more force, and are entitled to no more weight as against him than the mere verbal declarations of Edward and Stephen D. Leverich. The rule which holds a retired partner is only for the protection of those former dealers with the firm, who continue to deal with the firm, and it holds him liable that they may suffer no injury or loss from such retirement unknown to them. But the rule does not go so far as to hold that the mere naked declarations and admissions of the remaining members, not connected with any dealings, upon which the dealer takes no action, and in which he reposes no confidence, can be used against the retiring member. It was therefore error to overrule the objection to this evidence.

[Minor point omitted.]

The judgment should therefore be reversed and a new trial granted, costs to abide event.

Judgment reversed.

All concur, except RUGER, C. J., dissenting, and RAPALLO, J., absent.

DILLENBECK V. DYGERT.

(97 N. Y. 303.)

Negotiable instrument — right of accommodation maker to contribution.

One of the several accommodation makers of a joint and several promissory note paid it, and afterward transferred it for value to a third person. *Held*, that the transferee could maintain an action for contribution against the other makers, although he paid the full face, the transferor paid the full interest for several years, and the transferee proved the note for the full amount against the transferor in bankruptcy, and received and credited a dividend.

ACTION for contribution. The head-note states the case. The plaintiff had judgment below.

Dillenbeck v. Dygert.

M. Rumsey Miller, for respondent.

J. F. Parkhurst, for appellants.

FINCH, J. We affirm this judgment upon the ground that the note, which was paid by George W. Snell, although extinguished as such by the fact of its payment, remained in the hands of Snell, the evidence of a right to contribution against his co-sureties, establishing both that they incurred the original obligation to contribute, and the fact of payment by Snell, which made that obligation operative in his favor; that the transfer of the note by Snell to the plaintiff was for a valuable consideration, and the court below correctly held that its delivery to the plaintiff passed to him the right of contribution of which it was the evidence; and that this result is not defeated by the fact that both parties supposed it gave to the transferee a greater right, and held the co-sureties as makers, instead of contributors, for the amount paid by Snell. The novelty and possible importance of the question seem to require that the reasons for our conclusion should be sufficiently developed.

It must be remembered that the exception here argued concedes the liability of the co-sureties defending to somebody, either to Snell himself, or to plaintiff as his assignee, and the sole inquiry is, not whether they are liable at all, but simply whether they shall pay Snell, or his alleged assignee. The only question is, which of two is entitled to receive the money that is certainly due to one; and the only interest of the defendants in that question is to know which is the person to whom they may safely pay a debt, which, on this appeal, must be treated as valid and existing. Since therefore it is immaterial to the defendants which of the two they pay, provided only they pay but once, the practical question remaining is whether Snell, as between him and plaintiff, is entitled to collect and receive this admitted debt notwithstanding what passed between them; and that again is the inquiry whether Snell transferred absolutely nothing, and got plaintiff's money for nothing. We say got his money for nothing, since the proof is that plaintiff advanced to Snell the whole \$500; and as it also appears that at the date of the transfer there was owing to plaintiff by Snell only the two sums of \$130 and \$100, and that at the time of such transfer some money was paid, the inevitable inference is that upon delivery of the note the difference between its face and the amount of Snell's subsisting

Dillenbeck v. Dygert.

debt was advanced in cash. The injustice of denying to plaintiff any right whatever against the defendants, and leaving it in the ownership of Snell, requires us to consider whether any rule of law compels such a result.

For some distance in the appellant's argument we feel bound to go with him. That the note was extinguished by payment, and therefore the doctrine of subrogation does not apply, we concede. The creditor had nothing but the note. Until it was paid by one of the co-sureties, he could gain no right as against his fellows. Their liability to him depended upon his extinction of the common debt. Subrogation implies a presumed intention to keep the creditor's security alive, and the equity of so doing as against a principal debtor. Contribution is among sureties only, and presumes the payment and extinguishment of the debt by one for the benefit of all. It rests rather upon the equity of equality than upon contract, though at law, to save the right, a promise to contribute will be implied. *Campbell v. Mesier*, 4 Johns. Ch. 334; *Davis v. Perrine*, 4 Edw. Ch. 64; *Armitage v. Baldwin*, 5 Beav. 278.

It follows also as the appellant argues, that the transfer of Snell's right of contribution cannot be held to have passed as an incident to the transfer of the note as a principal obligation, since payment left it not an obligation at all; and that if the right of contribution passed, it did so as a new and principal obligation, and not as accessory to a dead and extinct note, and that brings us to the fundamental inquiry, what was the effect of the transaction between Snell and the plaintiff.

It is obvious on the face of it that both parties intended that some right against the signers of the note should be transferred. The note in the hands of Snell, although extinguished as such by payment, was yet the evidence of the liability to contribution by the co-sureties originally incurred, and also of the payment by Snell which gave him the right to enforce such obligation. *Hodgson v. Shaw*, 3 Myl. & K. 183. If when Snell paid the note, he had taken from the payee, besides the note, a written receipt acknowledging its payment, and then Snell had transferred both note and receipt to plaintiff for a valuable consideration, there being no other facts but that bare transaction, an intent to transfer the right to contribution would be easily and necessarily inferred. But since the note in Snell's hands was the equivalent of a receipt from the

Dillenbeck v. Dygert.

payee, and equally evidence of payment, the transfer of the note, no other facts being present, would compel an inference that the right of which it was the evidence and which subsisted, and not the right which was gone and dead, was intended to be transferred. If in just such a case as that supposed the co-sureties had paid to plaintiff their contributory shares, and thereafter Snell had sued them for contribution as due to him, it is hardly possible to doubt that the payment to plaintiff would have been held good. The intent of the party is to be inferred from his acts; the intent to transfer some right rather than no right would have been an inevitable presumption; and since no right of which the note was evidence existed, save the right of contribution, an intention to transfer that right would necessarily have been presumed. But this case does not stop at the bare fact of the transfer. The legal inference of intent deducible from that is claimed to be rebutted and supplanted by facts showing a different intent and that a purpose to transfer the note as a note, and as a living obligation against the signers for its full amount was proved, which is inconsistent with the primary intent inferable from the bare fact of transfer. The facts relied upon for this purpose were three: first, that plaintiff advanced the full face of the note and not merely the amount due for contribution; second, that Snell steadily paid to him the full interest upon the note which he indorsed thereon; and third, that upon Snell's failure the plaintiff proved this note against him in bankruptcy for its full amount, and received and credited a dividend thereon. It seems to us that none of these facts are inconsistent with an intent deducible from the bare transfer to assign and pass the right of contribution. When plaintiff advanced to the full amount of the note he may very well have assumed that Snell would be liable to him for the full amount of his advance, and the note serve as a memorandum or evidence of that fact, while establishing only as against the other signers a liability, less in amount, and measured merely by their duty of contribution. On that basis it would be natural and proper for Snell to pay the full interest, and not strange that its payment was indorsed on the note. And on that basis the plaintiff might well prove his debt against Snell in bankruptcy and receive a dividend upon it without waiving recourse to the sureties remaining liable, at least if nobody objected. The intention on the part of plaintiff to hold Snell for the full amount of the advances, and to treat the note transferred as a

Dillenbeck v. Dygert.

memorandum of such amount and the payments thereon, could easily co-exist with an intention to hold the other signers as security for the same debt to the limit of their actual liability. An intent on the part of Snell to give to plaintiff a right against himself to the full amount of the face of the note could co-exist also with a further intent to transfer in addition and as added security the liability of the co-sureties for contribution. These facts therefore do not necessarily disprove the primary intent derived from the transfer. They show only another and added intention to hold Snell for the full amount without necessarily disproving a co-existing intent to transfer on one side and hold on the other a liability of the sureties for a lesser sum.

But beyond this view of the case there remains another. While no one of the parties has testified that this transfer was made under a mistake of law, and in the absence of such proof, we ought to presume that they knew the law, and acted in the light of that knowledge, it may still be possible to infer from the facts that both parties thought the note a valid and subsisting obligation against all the signers, and had no conscious and definite intent to transfer anything else. But grant that they did not; does it follow that the right of contribution did not pass? It is argued that it did not pass unless the minds of the parties met over that specific transfer; that there must have been a mutual intent to assign that identical right; and no such meeting of minds or mutual assent existed. But it was said in *Schuyler v. Smith*, 51 N. Y. 314; s. c., 10 Am. Rep. 609, that "the general rule undoubtedly is, that it takes two parties to make an agreement, and that their minds must meet. But this rule is not of universal application. The law sometimes steps in and makes agreements for parties which they did not mutually intend." In the opinion in that case pertinent illustrations are given, but some more nearly allied to the case in hand may be gathered from the reports. In *Oneida Bank v. Ontario Bank*, 21 N. Y. 490, a loan was made to a bank for which post notes were delivered which were illegal, but were afterward assigned by the lender to another bank, and it was held that the assignee could recover on the original loan, although the action was on the post notes, and no transfer of the original loan had been made. There, as here, there was no specific transfer of the right which existed, and there, as here, a transfer only of something utterly dead and worthless. What the parties had in their

minds was the post notes only, and yet the law made the worthless paper carry to the assignee the valuable right, when such a thought probably never entered the mind of either party. Cases have arisen in which a mortgage, void for usury, has been assigned to third parties, and which was held to carry to the assignee the right to an old security not usurious, for which the void mortgage was given. *Gerwig v. Sitterly*, 56 N. Y. 217. The reasoning in that case justifies much that we have said in this, but it especially shows how the law deems within the intent of the parties something which was never present to their thoughts, and in spite of some ineffectual thing which was so present. In that case it was said that "it never was the intention of the assignor to retain any thing for himself in respect to the original debt," and with equal propriety we may say here, that Snell never intended to retain for himself, and to be enforced by him, a right of action against the sureties. Still another class of cases are those in which a mortgage has been foreclosed by proceedings entirely ineffectual to pass a title, and where the purchaser's deed has been held to operate as an assignment of the mortgage. *Jackson v. Bowen*, 7 Cow. 14; *Robinson v. Ryan*, 25 N. Y. 324. In these instances there never was in the mind of either party a conscious intention or purpose of assigning the mortgage. On the contrary, the actual intention was to extinguish the mortgage and transfer the land. In the former of these cases it is said, "the intention was to pass a greater interest. If that failed, it is no objection to the operation of the instrument as an assignment. *Valeat quantum valere potest.*" In that maxim thus quoted lies the germinant seed of the whole doctrine. As the greater right includes the lesser, even though they are of different character, the intent to convey the greater includes the intent to convey the lesser, and if the former fails the latter may prevail. So much shall pass as can pass. In the present case it is quite certain that Snell did not intend to reserve in himself any right or interest which the note in his hands represented, or of which it was the evidence. He thought he was passing the greater right, but did not think he was reserving the lesser one. Plaintiff did not suppose that he was gaining no right against any one but Snell. We think it a true construction of the transfer that so much passed as existed and was capable of passing, and that the mutual intent must be held not limited to the void and useless transfer.

Chase v. Second Avenue Railroad Company.

We have examined other objections to the judgment, but find them insufficient to establish error.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except RUGER, C. J., dissenting, and RAPALLO, J., not voting.

CHASE V. SECOND AVENUE RAILROAD COMPANY.

(97 N. Y. 384.)

Contract — license — implied extension.

The defendant in consideration of a specified yearly compensation, payable monthly, gave the plaintiff the exclusive privilege of placing advertisements in its cars for two years from December 30, 1876. After the expiration of that time, without further agreement, the plaintiff continued to place advertisements in the cars, making the like monthly payments, until May 1, 1881, when the defendant refused to allow him to do so any longer. In an action for damages, *held*, that the defendant was not bound to permit him to continue the advertisements for the rest of the year 1881, and that the action was not maintainable.

ACTION for breach of contract. The opinion states the case. The defendant had judgment below.

John Brooks Leavitt, for appellant.

Austen G. Fox, for respondent.

EARL, J. In August, 1876, the plaintiff entered into a written contract with the defendant, whereby in consideration of \$1,200 per year payable in monthly installments of \$100 each, he was to have the exclusive right to place advertisements in its cars for two years from the 30th day of December of that year. In pursuance of that contract he placed and kept advertisements in the cars for the two years, and paid the stipulated compensation. After the expiration of the two years, without any further agreement, he continued to place and keep advertisements in the cars until May 1, 1881, making the monthly payments, when, in pursuance of a notice requesting him to remove the advertisements from the cars on or

Chase v. Second Avenue Railroad Company.

before that day, it removed them from its cars and refused to permit him to place any more therein.

The plaintiff claims that by permitting him to keep his advertisements in the cars after December 30, 1880, and taking pay from him, the defendant must be held by implication to have renewed the original contract for another term of two years from that date and that at least by permitting him to enter upon another year in 1881, it was bound to permit him to keep his advertisements in the cars for the whole of that year.

This action was brought to recover damages from the defendant for its refusal to permit the plaintiff to keep his advertisements in the cars after May 1, 1881. He was defeated at the trial and then appealed to the General Term and to this court.

The written contract between the parties amounted either to a license or to a lease (it is unimportant to determine which), to use the defendants' cars, personal property, for a certain purpose. The law did not imply a renewal of the contract for a term of two years, because such a contract which was not to be performed and could not be performed within one year, not being in writing, was void under the statute of frauds. The law will not imply an unwritten contract which the parties themselves could not make without writing. It will sometimes imply an obligation on the part of a person who has received a benefit under a contract condemned by the statute of frauds, to make compensation to the other party. An implied contract is one which the law infers from the facts and circumstances of the case; but it will not be inferred, so far as I can conceive, in any case where an express contract would for any reason be invalid. The law will not make that valid without a writing which the law requires should be in writing.

Contracts void under the statute of frauds will sometimes be specifically enforced in equity, not because they are treated as valid, but for the prevention of fraud.

This is not an equitable action for the specific performance of any contract or to compel the execution of a valid lease or contract on the part of the defendant. No such relief was claimed in the complaint or upon the trial. The action is to recover damages for the breach of an alleged valid agreement, and to maintain it the plaintiff must show a valid agreement.

The claim of the plaintiff that he was entitled to the benefit of the contract for the whole of the year subsequent to December 30,

Gay v. Seibold.

1880, upon the ground that there was an implied contract for the whole of that year, is also unfounded. If the cars had been real estate leased to him, his claim would have foundation. A tenant of real estate, permitted to hold over after the expiration of his tenancy, may hold for another year upon the same terms. The landlord has his option to treat the tenant as a trespasser or as a tenant for another year. But if he takes rent, or otherwise assents to the holding over, then the tenant has the rights of a tenant for another year. *Schuyler v. Smith*, 51 N. Y. 309; s. c., 10 Am. Rep. 609. These are technical rules applicable to real estate, which have never been applied to personal property, and so it was held in *Chamberlain v. Pratt*, 33 N. Y. 47. To the reasoning of that case nothing needs to be added. By using the cars after the expiration of the first term of two years, the plaintiff acquired no new rights. It was always in the power of the defendant to put an end to his occupancy of its cars at any time.

The plaintiff also invokes the doctrine of estoppel *in pais* against the defendant, but I see no basis for it to rest upon. For aught I can see his damage and his embarrassment would have been just as great if it had removed the advertisement from its cars on the 30th day of December, 1880. It did nothing to mislead him. He knew that his contract had expired, and that he was using the cars at the will of the defendant, and it simply exercised a right which he was bound to know it had.

Therefore without giving our reasons at greater length, we are of opinion that the judgment is right and should be affirmed, with costs.

Judgment affirmed.

All concur.

GAY V. SEIBOLD.

(97 N. Y. 473.)

Partnership — statute — “& Co.” representing no actual partners.

A bond was executed to “John Gay and Charles Gay, Jr., doing business as Gay Brothers & Co.” They were, as the obligors knew, the only partners. *Held*, not within the statute prohibiting the transaction of business in the name of a partner not interested, and requiring the designation “& Co.” to represent an actual partner, under penalty as a misdemeanor for non-observance.

Gay v. Seibold.

ACTION on a bond. The opinion states the case. The defendant had judgment below.

Joseph P. Carr, for appellants.

Wm. L. Jones, for respondent.

EARL, J. On the 9th day of November, 1880, the plaintiffs, book publishers of the city of New York, entered into a written agreement under the name of Gay Brothers & Co., with the defendant John S. Seibold, whereby he, for certain considerations to be paid to him, agreed to act as clerk and manager of their branch office in the city of Buffalo for the sale of their publications which they were from time to time to consign to him. He was to keep accounts of his stock and of receipts and disbursements of money, and make remittances from time to time of balances, after deducting his commissions, to the plaintiffs. He was to canvass personally for the sale of books each afternoon, and devote the morning of each day to office work until such time as the office work should require his entire time and attention; and he was expected to employ other canvassers to aid him in his work. In the agreement the plaintiffs were described as Gay Brothers & Co., and in that name they executed it.

On the same day John S. Seibold, the respondent, William H. Seibold and Adele Seibold executed and delivered to "John Gay and Charles Gay, Jr., doing business as Gay Brothers & Co., in the city of New York," their bond, conditioned to be void if John S. Seibold should well and truly pay to "Gay Brothers & Co." all sums due from him, under the agreement, in the manner and at the times prescribed.

Thereafter, in pursuance of the agreement, the plaintiffs intrusted John S. Seibold with their books and publications, and he disposed of the same and received money on account thereof which he failed to account for and pay to them, and this action was commenced to enforce the obligations of his bond. William H. Seibold in his answer, among other things, alleged as a defense that the plaintiffs "were and are carrying on business in violation of law in this, to-wit: that said plaintiffs were and are carrying on business in the name of Gay Brothers & Co., with the designation of 'and Company' or '& Co.,' and said presented bond is so

Gay v. Seibold.

made by said plaintiffs with said designation of 'and Company' and '& Co.,' to-wit: 'Gay Brothers and Company' and 'Gay Brothers & Co.' and the said '& Co.' represents no actual partner or partners in violation of the act of the legislature of the State of New York, entitled "An act to prevent persons from transacting business under fictitious names."

Upon the trial it was proved that the plaintiffs had for two years been carrying on business in the city of New York under the firm name of Gay Brothers & Co., and that they were the only members constituting the firm. At the close of the evidence the court nonsuited the plaintiffs upon the ground that they "having made the contract in suit, and having engaged in carrying on business under the firm name of 'Gay Brothers and Company,' while the words 'and Company' represented no actual person who was a member of said firm at the time of the making of the contract out of which the cause of action here arose, were violating thereby the statute" above referred to, and could not for that reason recover in this action. The sole question for our determination is whether the nonsuit should have been granted upon the ground stated.

There was no allegation in the answer, or proof upon the trial, that the plaintiff's business in Buffalo was carried on by John S. Seibold in violation of the statute, or that he was required so to carry it on, or that the contract was entered into and the bond made to aid the plaintiffs in violating the statute. The plaintiffs were nonsuited simply because they were carrying on business in the city of New York under the name of Gay Brothers & Co., and entered into the contract with John S. Seibold in that name, and were described in the condition of the bond under that name.

The statute referred to is the act chapter 281 of the Laws of 1883, and reads as follows: Section 1. "No person shall hereafter transact business in the name of a partner not interested in his firm, and where the designation 'and Company' or '& Co.' is used, it shall represent an actual partner or partners." Section 2. "Any person offending against the provision of this act shall, upon conviction thereof, be deemed guilty of a misdemeanor and be punished by a fine not exceeding \$1,000."

This statute does not appear to be a very useful one. It does not compel partners to disclose their true names, or any of their names in the partnership designation. They may still do business under any style, not untruly containing the name of any person

which they choose to assume, such as the "Union Towing Company," the "Eureka Company" or other fanciful names, *Crawford v. Collins*, 45 Barb. 269; *Wright v. Hooker*, 10 N. Y. 51; and it may be very difficult in such cases to ascertain who the numerous persons are composing the partnership. Even an individual may transact his business under such a name without violating the statute. So these plaintiffs could have done business under the name of "Gay & Co.," and the public would have been just as liable to imposition as when the business was done under the name of Gay Brothers & Co. Persons giving credit to a firm either rely upon the responsibility of the firm by whomsoever it may be constituted, or they rely upon the members thereof whose names by inquiry or in some other way become known to them. Without this statute, one imposed upon by a fictitious firm would have his civil remedy for the fraud or deceit, and there would generally also be a remedy by indictment for false pretenses. So the statute is not only not very beneficial, but it is also highly penal, and it should therefore be strictly construed.

To violate this statute, the designation "and Company" or "& Co." must be used in the transaction of some business. The purpose of the statute was obviously to protect persons giving credit to the fictitious firm on the faith of the fictitious designation. It could have had no other purpose. It was not needed to protect those who obtained credit from such a firm.

Although one may be doing business generally in violation of this statute, a violation thereof may not be predicated of any transaction in which the false designation is not used, and an indictment under the statute cannot be based upon such a transaction.

Here John S. Seibold when he signed this contract, and this appellant when he executed the bond, knew that these plaintiffs alone constituted the firm. It was so stated in the bond and the bond ran to them in their true names. This business was in fact consciously done with them in their real names and not under any false designation, and hence it may be well said that the statute was not even in form violated. But no credit was given to and no reliance placed upon the false designation, and in fact no credit whatever was given to the plaintiffs. The object of this bond was to secure the plaintiffs for a credit given by them to John S. Seibold. Besides here all the parties to this transaction knew who

Gay v. Seibold.

the real partners were. No one was deceived, and there was no possibility that any of the parties to the bond could be imposed on or harmed by the false designation. To indict and punish the plaintiffs for a crime in such a case would be most absurd and would shock the common sense, and the sense of justice of every right-thinking person. This case is not therefore within the purpose or intention of the statute, and such a transaction is not one of the mischiefs sought to be remedied by the statute. Therefore although this transaction should be held to be within the letter of the statute, it is clearly not within the purpose and intention of the statute, and hence it is outside of the statute. It is a rule peculiarly applicable to the construction of penal statutes, that a thing within the letter of a statute is not within the statute unless within the intention thereof; and so too in the construction of remedial statutes, it is generally held that a thing within the intention is within the statute though not within the letter; and these rules have many illustrations in the books. *People v. Utica Ins. Co.*, 15 Johns. 358, 360; *Holmes v. Carley*, 31 N. Y. 289. It is said in an old case, *Eyston v. Studd*, 2 Plowden, 465, "it is not the words of the law, but the internal sense of it that makes the law, and our law like all others consists of two parts, viz., of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis*."

Applying this rule therefore in the construction of this statute we are of opinion that upon the facts appearing in this record, this transaction was not within the statute, and upon this ground the judgments of the General and Trial Terms should be reversed and a new trial granted, costs to abide event.

Judgment reversed.

All concur, RUGER, C. J., in result.

VOL. XLIX — 68

MEYER V. PHILLIPS.

(97 N. Y. 435.)

~~Easement—prescription—floatage—injunction—parties.~~

The defendant, claiming a prescriptive right in the public, proposed to float logs down a private stream running across the plaintiff's land, whenever he chose. The act would do some injury to the banks and other lands of the plaintiff. In thirty years the stream had been so used by not more than twelve persons, and by not more than three or four in any year, and for not more than from three to six days in any year. *Held* (1), that no prescription was established; (2), that all parties asserting the right might be joined as defendants; (3), that an action lay to restrain the defendants and settle the plaintiff's rights.

ACTION for injunction, etc. The opinion states the case. The defendant had judgment below.

N. C. Mouk, for appellant.

L. H. Northrup, for respondents.

EARL, J. It is not claimed that the North-west Bay brook is in its nature, under common-law rules, a navigable stream, and that as such the defendants have any rights therein; nor is it claimed that they have any private right to use the stream by prescription, as they and those under whom they hold had not used it for any purpose for the time and in the manner required to gain a prescriptive right. But the claim is (and so it was held at the trial term) that the public had acquired a prescriptive right to use the stream for floating logs, and that these defendants therefore, as portions of the public and in the rights of the public, had the right to use the stream and its banks for the purpose named.

We do not deem it important now to determine, and we do not decide whether or not the public can acquire by prescription an easement to use any stream for floating logs or any other purpose. The question has been considered in several cases in this State. *Shaw v. Crawford*, 10 Johns. 236; *Munson v. Hungerford*, 6 Barb. 265; *Curtis v. Keesler*, 14 id. 511; *Clements v. Village of West Troy*, 10 How. Pr. 199; *Post v. Pearsall*, 22 Wend. 425.

Even if user could give a prescriptive right to the public there was no such user here as could give such a right. The public gen-

Meyer v. Phillips.

erally have never used and could never use this stream. In the whole thirty years covered by the evidence it does not appear that as many as a dozen different persons used the stream for floating logs, and generally not more than three or four different persons used the stream in any one year; and the user did not exceed about six days in any year, and some years not more than three. The stream is less than five miles long, two of which are through plaintiff's lands. Such a stream, capable of being used by a very limited number of persons, is not adapted to a public use, and such a use as existed here could not confer a public right which could be enjoyed by the public at large.

The cases above cited show that there could be no claim that this stream had been dedicated to the public use, and indeed such a claim has not been made.

It is therefore entirely clear that the defendants had no right to float logs down this stream through the lands of the plaintiff.

But it is claimed that the facts of this case did not authorize equitable interference or sustain the jurisdiction of an equity court and it is upon this ground that the General Term affirmed the judgment of the Special Term. The defendants threatened to float a large number of logs over the plaintiff's lands, using the stream and its banks for that purpose, and they would thus do some damage to the banks of the stream and other lands of the plaintiff. They would occupy the stream for several days. Not only this, they claimed the right to float the logs, and asserted in substance that they would do so whenever they chose to. By continuing to exercise the right they might by lapse of time be able to prove and establish a right by prescription. They not only claimed a right for themselves but for the public—for everybody. That in such a case, upon such facts, a plaintiff may maintain an equitable action to quiet his title and settle his rights and prevent the threatened injury is abundantly settled by authority. *Ang. Water-courses*, § 449; 2 *Story Eq. Jur.*, § 927; 3 *Pom. Eq. Jur.*, § 1351; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Campbell v. Seaman*, 63 N. Y. 568; s. c., 20 Am. Rep. 567; *Johnson v. City of Rochester*, 13 Hun, 285; *Swindon Water-works Co. v. Wilts. & Berks. Canal Co.*, L. R., 7 H. L. 697; L. R., 9 Ch. App. 451; *Clowes v. Staffordshire Potteries*, 8 id. 125, 142; *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R., 1 id. 349, 354.

Carpenter v. Boston and Albany Railroad Company.

This is not a case where the defendants threatened only to commit a single trespass, but they threatened to commit and claimed the right to repeat the trespass every year. Here a preventive action was proper to prevent an irreparable injury within the meaning of the equitable rule, and also to avoid a multiplicity of suits.

The defendants were properly united. They claimed a common right hostile to the plaintiff. They asserted a public right common to many. In such a case all the parties asserting the common right may be united as defendants in an action by one who seeks to overthrow the common claim and establish his right against all claimants. *Varick v. Smith*, 5 Paige, 137; *Dimmock v. Bixby*, 20 Pick. 368, 377; *Woodruff v. North Bloomfield, etc.*, 8 Sawyer, 628; *Hillman v. Newington*, 57 Cal. 56.

As the plaintiff therefore when he commenced this action had the right to maintain the same upon the facts then existing, he could not be defeated because since the commencement of the action the logs had been floated down the stream. The court having acquired jurisdiction should retain it to administer complete justice. The real importance of the action still remains, to-wit, the defendant's right. That may be settled, and the damages sustained by floating the logs may be awarded to the plaintiff.

We are therefore of the opinion that the judgments of the Special and General Terms should be reversed and a new trial granted, costs to abide event.

Judgment reversed.

All concur.

CARPENTER V. BOSTON AND ALBANY RAILROAD COMPANY.

(97 N. Y. 494.)

Railroads — negligence — throwing mail-bags.

The plaintiff, waiting on the platform of defendant's station for a train, was struck by a mail-bag thrown from the postal car in the approaching train by a clerk in the employ of the United States. It appeared that it had long been the well-known custom to throw off the bags when passengers were on the platform, and it did not appear that the defendant took any precautions to prevent injury. *Held*, that a recovery was justifiable.*

* See *Snow v. Fitchburgh Railroad Company*, ante, 40.

Carpenter v. Boston and Albany Railroad Company.

ACTION for personal injury by negligence. The head-note and opinion show the facts. The defendant had judgment below.

Charles L. Beale and Robert E. Andrews, for appellant.

John Cadman, for respondent.

DANFORTH, J. The plaintiff was injured before the actual commencement of his journey, but he was lawfully on the platform because he was a passenger, and was approaching the train, as the defendant concedes, "in the usual and ordinary way," to enter the car in which he had purchased a right to travel. The law in such a case is well settled. It imposes an obligation on the railroad company to take reasonable care that a person holding that relation to it shall while on its premises be exposed to no unnecessary danger or one of which it is aware, and requires it to provide for him a safe passage to the train. It is obvious that was not done in this case. The plaintiff was knocked down, and severely hurt, by a loaded mail-bag thrown from the postal car while the train was in motion, and the only answer to his demand for compensation is that the missile was negligently thrown by the person in charge of the mail car, an employee or servant of the United States, and not of the company; that he was an independent agent, and hence, the defendant says, it is not liable for his act. In support of this contention its learned counsel cites *Nolton v. Western R. Co.*, 15 N. Y. 444; *Blair v. Erie R. Co.*, 66 id. 313; s. c., 23 Am. Rep. 55; *Penn. R. Co. v. Price*, 96 Penn. St. 256, and *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 113.

I am unable to give to those cases that consequence. The Pennsylvania case was an action against a railroad company for damages for the death of a postal clerk, caused by a collision. A recovery was denied, but the question turned solely upon the construction of a statute of that State. It has no application here. But if it had, the decision is directly opposed to that of this court in cases also cited by the respondent, viz.: *Nolton v. Western R. Co.* and *Blair v. Erie R. Co.*, *supra*, in each of which a recovery was had on the ground that the defendant owed a duty to the person injured (in one case a postal clerk and in the other an express agent), and neglected to perform it. That principle we think the plaintiff may also successfully invoke, and find support in the other case, *Putnam v. Broadway, etc., R. Co.*, *supra*, cited by the respondent.

It was there held, in substance, that a railroad company was bound to exercise the utmost vigilance not only in guarding its passengers against careless interference by others, but even against violence, and if in consequence of neglecting this duty he receives injury, which in view of all the circumstances might have been reasonably anticipated, it is liable. The defendant prevailed in that case on the ground that the mischief was one which it had no reason to expect, and so was under no obligation to guard against. But if it had been made to appear that he who made the assault was vicious and accustomed under similar circumstances to do hurt, and the defendant had been notified of the fact, a duty would, as the case also holds, have been imposed upon it either to remove him from the car, or inform its other passengers of their danger, and failing to do so, would be responsible for such harm as he occasioned. To the same effect is *Mustor v. C., M. & St. P. Ry. Co.** There the plaintiff was at work for the defendant at its depot, standing on a scaffold erected by it; the defendant's train, of which a mail car formed part, ran past, and a mail-bag thrown from it by a postal agent struck the leg of the scaffold with such force that it fell and the plaintiff was injured. He failed in his action. Upon appeal, the court, in answer to the claim that the defendant was negligent in not informing the plaintiff of his peril, said: "All the evidence on that subject is to the effect that the mail-bag was usually discharged near the mail catcher, which was two hundred feet west of the depot, and there is no testimony whatever that it had ever before been thrown off at the depot, adding: "The company is not chargeable with notice that it was likely to be thrown off at the depot, and hence was not required to guard, by notice or otherwise, against an accident to the plaintiff resulting from its being thrown off there on the occasion in question." In such cases no doubt *scienter* is the gist of the action, and in those cited it was lacking. In the one before us it was clearly established. The defendant constructed the postal car and owned it. It was occupied under defendant's permission for a certain use, and it may be conceded that there was nothing in the nature of that use to require the defendant to expect that the contents of the car would be violently cast upon the platform while the train was in motion, and before the passengers thereon could

* *Ante*, 41.

Carpenter v. Boston and Albany Railroad Company.

reach the cars. Had this accident therefore happened on the first passage of the car, the defendant might be excused, as in the case cited, on the ground that the mere act of the postal clerk in throwing off the mail-bag at that place, without the previous knowledge of the defendant of his intention to do so, was not negligence on its part.

But the fact is quite otherwise. The practice which led to the accident was a familiar and usual one. It was proven by uncontradicted evidence that this method of discharging mail-bags from the postal car, upon the platform provided for passengers, and while they were upon it and exposed to injury, had prevailed for a long time, under circumstances from which notice to the defendant might be fairly implied, and with the actual knowledge of the defendant's agents in whose presence the act was frequently if not daily performed, and so far as appears without the slightest objection on their part. They were therefore chargeable with notice that the mail-bag was likely to be thrown off in the same manner and under the same circumstances at any arrival of a postal car. By this knowledge the defendant was brought fairly within the rule which enjoins care not only on the part of itself and its servants, but also like care in preventing injury from the careless or wrongful act of any other person whom it permits to come upon its premises.

The occupants of the postal car are no exception to this rule; they were not strangers or uninvited. They came under a contract voluntarily made by the defendant and which secured the carriage and delivery of the mails upon such conditions as it imposed or acceded to. Its police power extended over the persons employed in it while they were on the defendant's track or at its stations, certainly not to interrupt them in the discharge of their official duties, but so far as practicable to prevent injury to those for whose safety it was bound to provide. So it was held in *Stewart v. Brooklyn and Cross Town R.*, 90 N. Y. 588; s. c., 43 Am. Rep. 185, applying the rule to violence committed by strangers and co-passengers, in *Flint v. Norwich & N. Y. Trans. Co.*, 34 Conn. 554, to violence from whatever source arising, and this although the aggressors were soldiers received upon the boat on compulsion. The doctrine of that case is approved and its reasoning followed in the case of *Putnam, supra*.

Nor was it necessary in order to charge the defendant with the

duty of care and vigilance that on some former occasion a like injury had happened. The act was itself dangerous. There was, under the circumstances of which the defendant had notice, a natural and probable connection between the act of throwing out a mail-bag with its contents and the injury which actually happened. It could have been foreseen, and the defendant owed a duty to those who might probably be on the platform, either to prohibit the practice which made the place dangerous, or exclude the passenger until train time, or provide some other way for ingress to the cars, or at least give notice to him that he must take care and avoid the danger or in some other way use reasonable caution to prevent damage from the danger of which it knew or ought to have known. Whether such reasonable care was taken by notice, guarding the way or otherwise, must be determined as a matter of fact. So far as the case now discloses, the defendant failed to do either of these things. It seems to me therefore that the plaintiff's evidence tended to establish every proposition which as set forth in his complaint constituted a fair cause of action — damages occasioned by the omission of duty which the defendant owed to him, and that he was not himself in default. These were questions for the jury and should have been submitted to them. The plaintiff was therefore improperly nonsuited.

It follows that the judgment of the Special and General Terms should be reversed and a new trial granted, costs to abide the event.

Judgments reversed.

All concur, except RAPALLO and FINCH, JJ., dissenting.

FERGUSON V. HUBBELL.

(97 N. Y. 507.)

Master and servant — contractor — evidence — expert — time to burn fallow.

The owner of land is not liable for injury by communication of a fire negligently set on his land by one contracting to clear the land.*

The proper time to burn a fallow is not a question of expert evidence. (See note, p. 554.)

* See *Harrison v. Collins* (86 Penn. St. 153), 27 Am. Rep. 699.

Ferguson v. Hubbell.

ACTION of damages by negligence in setting fire to wood. The opinion states the facts. The defendant had judgment below.

N. P. Hinman, for appellant.

S. Brown, for respondent.

EARL, J. On the 17th day of May, 1880, and for a long time prior thereto, the plaintiff owned a certain lot of land numbered 104 in the county of Warren in this State, and the defendant owned lot 116 situated north of 104, and lot 105 situated west of 104. The defendant had leased lot 105 to Charles Hammond to work upon shares, under an agreement by which each party was to furnish half the seed and have half the crops, and the defendant was to pay Hammond \$10 per acre for clearing so much of the lot as he should choose to clear. On Thursday, the 13th day of May, Hammond, for the purpose of clearing up a portion of his lot, set fire to some wood and brush thereon. That fire burned moderately and smouldered Friday, Saturday, Sunday and until Monday, when the wind began to blow and the fire started up and passed out of that lot upon lots 116 and 104. On Monday, the 17th, in the forenoon, the defendant, for the purpose of clearing up a portion of lot 116, set a fire upon that lot, and either at the time he set the fire or shortly after, the wind began to blow a sharp gale. One or both of the fires thus set upon these two lots passed upon lot 104 and set fire to and burned down a house and barn upon that lot belonging to the plaintiff; and this action was brought by him to recover his damages thus sustained.

Upon the trial it was a disputed question whether the fire which burned the buildings came from that set upon lot 105 by Hammond, or from that set upon lot 116 by the defendant; and the claim of the plaintiff was that if it came from either of those lots, the defendant was liable. But the defendant claimed that he was not liable for any damage done by the fire set by Hammond. The trial judge decided, and so instructed the jury, that in clearing upon lot 105 Hammond was an independent contractor and not a servant or employee of the defendant, and hence that the defendant was not liable for his negligence; and he charged the jury that if they found that the plaintiff's buildings were burned by the fire set by Hammond, they should render a verdict for the defendant.

We think the court was right in holding as matter of law that the defendant was not liable for the negligence or wrong of Hammond. Hammond was engaged in clearing upon lot 105 under a contract with the defendant to clear by the acre. He could perform his contract by carting the wood and brush away from the lot, or by burning it upon the lot. The defendant had no right to interfere in the work. Hammond was to employ his own help, and he could control and direct them, and choose his own time, and the defendant had no right to direct or control him in the manner in which he should do the work. He was therefore in no sense the servant of the defendant so that the doctrine of *respondeat superior* could apply. The defendant was entitled to the results of his labor, and could enjoy its fruits, but he could not direct the manner in which it should be performed. *McCafferty v. S. D. & P. M. R. Co.*, 61 N. Y. 178; s. c., 19 Am. Rep. 267. The case cited is a precise and sufficient authority. If instead of clearing off the wood and brush upon the lot, the contract had been to blast and remove rock, and if in blasting the rock portions of it had been thrown upon neighboring lands and there done damage, the defendant, under the case cited, would not have been liable; and there certainly can be no difference in principle, as bearing upon the question now under consideration, between a contract to clear off wood and brush and one to blast and remove rock. This was not a contract with Hammond to produce a nuisance or to do an act upon defendant's land which was necessarily dangerous. It was a contract to do a lawful thing, which if done in a proper manner would be reasonably safe to the owners of adjoining property.

The case was submitted to the jury to determine whether the fire which destroyed the buildings came from lot 105 or from lot 116, and they were also permitted to determine, if it came from lot 116, whether it was set at a proper time and managed in a proper manner. They found generally for the defendant, and it is impossible to know whether they based their verdict upon the ground that the fire was set upon lot 105, or upon the ground that it was set at a proper time, and managed in a careful manner upon lot 116. And it is therefore necessary to inquire whether error was committed in the rulings to which we will now call attention.

There was evidence tending to show that the fire was set upon lot 116 by the defendant at a time when the land was very dry, and

Ferguson v. Hubbell.

when the wind was blowing a strong gale in the direction of the plaintiff's lot. The defendant's witnesses gave evidence as to the condition of the land, the state of the weather and of the wind and various other circumstances surrounding the fire. As a witness in his own behalf he testified that he was a farmer, and that he had cleared and seen others clear land, and then he was asked this question: "What do you say as to whether or not as to that time the fires were set there at that place it was a proper time in your judgment for burning log heaps on a fallow that had been burned over?" The question was objected to on the part of the plaintiff as calling for a conclusion of the witness on a subject not proper to give an opinion; that the witness could only state facts and the jury must draw the conclusions. The trial judge remarked that the evidence would be received upon the principle that the witness was shown to have superior knowledge upon that subject. The plaintiff excepted to the ruling and the witness answered, "I thought it was." Another witness, who was shown to have had experience in clearing land, was asked this question: "How was it at that time as to being dry enough for a proper time to burn a fallow?" which was objected to on the part of the plaintiff as calling for a conclusion. The objection was overruled and the witness answered, "It was dry enough." Another witness who was also shown to have had experience in clearing land was asked this question: "What do you say as to whether it was a proper time or not to burn a fallow?" to which there was the same objection and ruling, and he answered, "I should say it was a proper time to burn it and advised him that way that day."

We think there was some evidence from which a jury could have found that the fire which destroyed plaintiff's buildings came from lot 116, and the jury may have found from the answers to these questions that the fire was set at a proper time and thus may have been influenced to find their verdict in favor of the defendant.

It is contended on behalf of the plaintiff that the questions objected to were improper, and that the subject of the inquiry was not one proper for expert evidence. The questions related to a vital point in the case. The principal claim on the part of the plaintiff was that in consequence of the wind and the dryness of the ground and the wood, brush and timber, it was an improper time to set fire; and whether it was or not was the main question to be determined by the jury if they reached the conclusion that

the fire came from lot 116. These witnesses were therefore asked their opinions upon a controlling issue which was to be determined by the jury. In answering the questions they did not testify to facts, and they did not tell what they knew as matter of knowledge. They simply expressed opinions which were based upon the facts as they existed. The general rule of law is that witnesses must state facts within their knowledge, and not give their opinions or their inferences. To this rule there are some exceptions among which is expert evidence. Witnesses who are skilled in any science, art, trade or occupation, may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are supposed from their experience and study to have peculiar knowledge upon the subject of inquiry which jurors generally have not, and are thus supposed to be more capable of drawing conclusions from facts and to base opinions upon them, than jurors generally are presumed to be. Opinions are also allowed in some cases where from the nature of the matter under investigation the facts cannot be adequately placed before the jury so as to impress their minds as they impress the minds of a competent, skilled observer, and where the facts cannot be stated or described in such language as will enable persons not eye witnesses to form an accurate judgment in regard to them, and no better evidence than such opinions is attainable. But the opinions of experts cannot be received where the inquiry is into a subject the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it.

It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions and do justice between the parties. Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. To require

Ferguson v. Hubbell.

the exclusion of such evidence, it is not needed that the jurors should be able to see the facts as they appear to eye-witnesses or to be as capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them, and comprehend them sufficiently for the ordinary administration of justice.

The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts they may be specifically contradicted, and if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without the fear of punishment. It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts. A long time ago in *Tracy Peerage*, 10 Cl. & Fin. 154, 191, Lord CAMPBELL said, that skilled witnesses came with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence. Without indorsing this strong language which is however countenanced by the utterances of other judges and of some text writers, and believing that opinion evidence is in many cases absolutely essential in the administration of justice, yet we think it should not be much encouraged and should be received only in cases of necessity. Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted.

From a careful examination of many cases in this and other States, we are satisfied that the questions objected to in this case should have been excluded.

In *Fraser v. Tupper*, 29 Vt. 409, in an action like this, a question entirely similar to this, was held to be inadmissible. That the defendant offered to prove by farmers who were acquainted with the clearing of land by burning the same, and who were upon the land the day the fires were set, and who described to the jury, as

well as they could, the position of the fire and the force and direction of the wind, that in their opinions it was a suitable and proper and safe day for setting the piles on fire with reference to the position of the piles in respect to the plaintiff's coal, and the force and direction of the wind. To this evidence the plaintiff objected, and it was excluded by the court, and to its exclusion the defendant excepted, and it was held that the ruling was proper. In the opinion of the court it is said: "There could be no difficulty in this case in the witnesses stating to the jury the position of the fires which were set by the defendant, their number and magnitude, the direction and course of the wind, the position, distance and character of plaintiff's property and its exposure to injury from that source. The jurors, upon the question whether the defendant exercised proper care, could form as definite an opinion, from the facts stated by the witnesses, as the witnesses themselves. The subject-matter is not one of science or skill, but is susceptible of direct proof, and in most cases the triers themselves are qualified from experience in the ordinary affairs of life, duly to appreciate the material facts when found. If there is any materiality attached to the force of the wind on that day, we do not see any difficulty in conveying a true idea of it sufficient at least for all practical purposes."

In *Higgins v. Dewey*, 107 Mass. 494, s. c., 9 Am. Rep. 63, the action was also like this, and the defendant offered to prove by a surveyor and civil engineer of many years' experience in clearing land by fire, who had observed the effects of wind on fires in different localities, and had been upon the land where the defendant set his fire and made a plan of it and was acquainted with the surrounding country, that there was no probability that a fire set under the circumstances in the case as described by the witnesses would be communicated to the plaintiff's land; but the judge excluded the evidence, and his ruling was held to be proper on the ground that the evidence offered related to a subject within the common knowledge of the jury. In *Luce v. Dorchester Mutual Fire Ins. Co.*, 105 Mass. 297; s. c., 7 Am. Rep. 522, the action was to recover for a loss on a policy of insurance against fire upon a dwelling-house which the plaintiff had left unoccupied at the time of the loss and for some time before; and the opinions of witnesses, that leaving a dwelling-house unoccupied for a considerable length of time increased its liability to be destroyed or injured by fire, were held to be inadmissible, on the ground that the subject

Ferguson v. Hubbell.

was within common knowledge. In *Sowers v. Dukes*, 8 Minn. 23, the action was to recover for a breach of contract in neglecting to build and keep in repair a fence around a certain field, whereby plaintiff's crops were injured. Upon the trial the plaintiff, a witness in his own behalf, was asked this question: "Was the fence a proper fence to turn stock, and could they easily put their heads through between the fence and rider?" This question was objected to on the ground that the jurors were the proper judges as to whether the fence was sufficient after it had been described. The objection was overruled and the witness was permitted to answer; and the question was held to be incompetent, and the judgment was reversed for that reason. It was held that the witness should have stated the facts; that the jury should have based their judgments upon the facts, and that it was not a proper subject for opinion evidence. In *Enright v. S. F. & S. J. R. Co.*, 33 Cal. 230, in a suit against the defendant for injury to plaintiff's cattle caused by an insufficient fence, it was held that the evidence of farmers that the fence was sufficient to turn cattle was improper. In *Bills v. City of Ottumwa*, 35 Iowa, 109, the defendant was sued for injuries to the plaintiff alleged to have been sustained in consequence of the bad condition of the street which caused him to be thrown from a wagon loaded with hay; and it was held that the opinion of a farmer, that a wagon loaded in the manner in which the one was upon which the plaintiff was riding was not safe for riding upon over ordinary roads, was inadmissible. In *Concord R. v. Greely*, 23 N. H. 237, in a proceeding to assess damages for a right of way for a railroad, it was held that the opinion of a farmer as to the effect upon a farm of a railroad passing through it was inadmissible. In *Paige v. Hazard*, 5 Hill, 603, in an action for negligence in injuring and sinking a canal boat, the plaintiff, after proving the cause of action as alleged, called a witness who testified that he was a boatman and knew the boat in question previous to her being injured, that he had raised sunken boats and caused them to be repaired, and he was then asked the following question: "From the description of the situation of the boat as given by the witnesses, what would the damage be?" and it was held improper and that the witness' answer was inadmissible. In *Teall v. Barton*, 40 Barb. 137, the action was brought to recover damages caused by fire communicated by a steam dredge, and it was held that a question put to a witness who had had experience,

as to whether he considered it dangerous to use a steam dredge without a spark-catcher, was properly overruled, it not being a question of science or skill, and not falling within the rule relating to evidence by experts. In *McGregor v. Brown*, 10 N. Y. 114, the action was by a landlord against his tenant for waste; and it was held that the opinions of witnesses, that the acts complained of were not injurious to the inheritance, and therefore not waste, were inadmissible.

In all these cases it was held that the witnesses should be confined to a statement of the facts, and that it was the province of the jury to draw inferences and form judgments. In most of them it was as probable as it was here that some of the jurors might not know as much about the subject of inquiry and not be as capable of forming opinions or drawing inferences from the facts as the witnesses; and yet it was held, as the subjects of inquiry were of such a nature that jurors generally might be presumed to have sufficient knowledge of them to enable them to discharge their duty when the facts were placed before them, that it was safer to rely upon them than upon the opinions of witnesses however expert they might be. Here the subject of inquiry related to the common elements of fire and wind and dry wood and brush and timber with which every man has some acquaintance; and whether under all the circumstances it was a safe, prudent or proper act to set a fire, a jury with the common experience which if not all men, most men have, would be sufficiently competent to form an opinion. This is not a case where it was impossible to place the facts before the jury. The character of the wind, the condition of the soil as to being dry or not, the character of the brush and timber, the nature of the ground, the distance, exposure, every thing, could be proved so that the jury would have substantially as correct knowledge in reference to it as the witnesses; if not as correct, they could acquire knowledge sufficiently correct to enable them to discharge their duty as jurors.

We have carefully examined the numerous cases cited in reference to this evidence in the brief of the learned counsel for the defendant, and none of them sustain its admission. They show that farmers may be permitted to give their opinion of the value of farms, and farm stock, and produce; that witnesses may give their opinions on questions of identity, or whether a person is under the influence of liquor, and as to many other matters. There is a broad range for expert evidence, but none of the authorities go far enough

Ferguson v. Hubbell.

to hold that this evidence is within the proper range. The question of expert evidence was not involved in the case of *Hays v. Miller*, 6 Hun, 320, and 70 N. Y. 112. The action in that case was brought to recover damages caused by fire to the lands of the plaintiff's intestate, through the alleged negligence of the defendant; and the referee, instead of passing upon the question of negligence directly as one of fact, made special findings of the circumstances, and from those found negligence as a conclusion of law, and he ordered judgment in favor of the plaintiff. The question under consideration upon the appeal was whether the inference of law was justified by the facts found. The appellant claimed that it was the duty of this court to review the conclusion of the referee, and decide, as matter of law, whether the facts and circumstances found by him established that the burning upon the defendant's land was conducted in an improper and negligent manner, or at an improper time and season, or whether it was conducted in a proper manner and at a proper time; and we held that this court was not competent to draw the conclusions and inferences from the facts; that that was a matter for the referee, and that we were concluded by the inferences and conclusions drawn from the facts by him; and in discussing that question some language was used by the judge writing the opinion in this court, which, it is claimed, favors the contention of the respondent here that these questions were proper to elicit expert evidence. But as we have seen, the learned judge writing the opinion did not have in mind the subject of expert evidence, and was simply discussing the competency and power of this court to draw inferences from facts and circumstances found by the referee; and it was held, as we always hold in such cases, that the inferences are for the triers of facts.

We are therefore constrained to reverse this judgment and grant a new trial, as we think an important rule of evidence was violated. To uphold the propriety of these questions would carry the rule of expert evidence further than it has ever been carried in this State, and would be an unwarranted invasion of the rule which confines witnesses to facts, and excludes their opinions. It is important to maintain the rule in its integrity, and to permit as few invasions of it as the proper administration of justice will allow.

The judgment should be reversed and a new trial granted, costs to abide event.

Judgment reversed.

All concur except MILLER, J., dissenting.

NOTE BY THE REPORTER.— Expert evidence is not admissible to show that actual danger from fire to certain premises has been increased by the erection of adjacent buildings; no person can be deemed an expert as to a matter of common experience and observation. *Franklin Fire Ins. Co. v. Gruver*, 100 Penn. St. 266.

Upon the question whether it was a material change of risk for insured property to become vacant during the existence of the policy, the testimony of experts, as a matter of opinion, is inadmissible. *Kirby v. Phoenix Insurance Company*, 9 Lea, 142.

Whether a piece of paper had the appearance of wadding shot from a gun, *held*, not a subject for expert testimony. *People v. Manke*, 78 N. Y. 611. The court said it was a "border case."

Whether a railroad cattle-guard was necessary at a particular point, *held*, not a subject for expert testimony. *Arnstein v. Gardner*, 184 Mass. 4.

But otherwise as to whether a certain platform was a proper place for a boy thirteen years old to drive two horses. *James v. Johnson*, 12 Bradw. 286.

Expert opinion as to the sufficiency of a sidewalk is incompetent. *Benedict v. City of Fond du Lac*, 45 Wis. 495.

The opinion of experts as to whether it is feasible to use a ladder-hole in a mine with a railing around it, is incompetent. *Mayhew v. Sullivan Mining Co.*, 76 Me. 100; citing *State v. Watson*, 65 id. 74.

In the latter case, upon the trial of an indictment for arson of farm buildings, where it was a material question whether fire was communicated from one building to another; *held*, that the opinion of an experienced city fireman upon the question whether under all the circumstances the fire would be thus communicated is not competent evidence. The court said:

"In the class of cases where the opinion of a witness is competent evidence, it becomes so not because the witness may be supposed, when compared with the jury, to possess superior powers of perception, intuition and judgment, or superior ability to draw correct inferences from proved facts; but because the nature of the question at issue is such that men of ordinary experience and intelligence must be supposed to be incapable of drawing conclusions from the facts in evidence without the assistance of some one who has special skill or knowledge in the premises.

"In the case of *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 78, it was held that the only cases in which opinion is evidence are those where the nature of the question involved is such that the jury are incompetent to draw their own conclusions from the facts without the aid of persons possessing peculiar skill and knowledge respecting such facts.

"Hence it follows that where an inference is to be drawn respecting matters which 'may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference.' *N. E. Glass Co. v. Lovell*, *ubi supra*.

"Accordingly in the last named case, where it became material to determine whether certain packages of glass-ware were stowed on or under the deck of a vessel which was stranded on Hart Island, and the plaintiffs offered evidence

Ferguson v. Hubbell.

tending to show that if they had been stowed under deck they or the remains of them would have been found there, and the defendants offered evidence tending to show that they might have been washed out, the opinion of a witness who had been acquainted with the navigation about there for thirty years and had been stranded there, and had been employed in saving and getting off wrecked vessels, and was near the place at the time of the wreck, upon the question whether, taking into view all the circumstances, the goods could have been broken to pieces in the hold or washed out of the hold as the defendants contended, was held inadmissible.

“ And in *Jefferson Ins. Co. v. Colheal*, *ubi supra*, witnesses long and familiarly acquainted with the business of insurance were not allowed to give their opinion as to the materiality of a representation or concealment, nor whether the risk had been increased by the erection of a boiler house adjoining the premises covered by the insurance.

“ In *Joyce v. Maine Ins. Co.*, 45 Me. 168, and *Cannell v. Phoenix Ins. Co.*, 59 id. 582, the opinions of witnesses who had had large experience in the business of insurance as to the comparative risk upon occupied and unoccupied dwelling-houses, and their testimony as to the fact that rates of insurance were increased when dwelling-houses were vacant, and as to the relative number of losses upon occupied and unoccupied buildings, were all held inadmissible.

“ These cases were decided in accordance with the rule and principle above stated, which may be regarded as well settled, the main difficulty being in the practical application of it to the ever varying circumstances of the cases in which it is sought to establish an exception.

“ In the case before us the incidental question was whether the fire was communicated from the barn to the dwelling-house; and it was plainly one within the scope of common experience, to be determined by and upon the facts and circumstances proved, from which the jury were fully competent to draw their own conclusions.

“ It was not a question upon which the opinions of those who had witnessed many fires either in city or country could be competent evidence. If the door were to be opened to opinions in such a case, there is seldom a case in which it could be closed; and the trial of causes would degenerate into a canvassing of the opinions of witnesses, often loosely given upon imperfect and prejudiced views, of the facts upon which the jury alone ought to pass.”

PEOPLE V. MANN.

(97 N. Y. 530.)

Constitutional law — “justice or judge” — justice of peace.

A justice of the peace is not within the constitutional provision that “no person shall hold the office of justice or judge of any court” after becoming seventy years old.

W RIT of prohibition. The opinion states the point. The writ was awarded below.

J. S. Millard and George W. Parkers, for appellant.

W. H. H. Ely, for respondents.

ANDREWS, J. Section 12 of article 6 of the Constitution mentions the Superior Court of the city of New York, the Court of Common Pleas of the same city, the Superior Court of Buffalo and the City Court of Brooklyn, and continues them in existence by express constitutional mandate. Section 13 is as follows: “Justices of the Supreme Court shall be chosen by the electors of their respective judicial districts. Judges of all courts mentioned in the last preceding section shall be chosen by the electors of the cities respectively in which said courts are instituted. The official terms of the said justices and judges who shall be elected after the adoption of this article shall be fourteen years from and including the first day of January next after their election. But no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age.”

The question presented is whether the limitation of age contained in this section applies to justices of the peace. That it does so apply has been determined by the judgment now under review. The same question was considered by the General Term of the fourth department in the case of *People v. Dohring*, 2 T. & C. 458, and was determined the other way. The *Dohring* case was decided in 1873, and the question now presented for the first time in this court has never, so far as we can ascertain, been considered in the courts below, except in that case and the one now before us, which

People v. Mann.

was first decided at Special Term in January, 1884. It has come to the knowledge of the court from official sources that since the adoption of the present judiciary article of the Constitution many persons in different parts of the State have been elected justices of the peace, who have served after having attained the age of seventy years, some having been elected before and others after they had reached that age. The question is therefore important, not only because it involves the interpretation of a constitutional provision, but also for the reason that it practically affects important public and private interests.

The policy of fixing by constitutional provision a limitation of age to judicial service, first established in this State in respect to the chancellor and judges of the Supreme Court by the Constitution of 1822, and abandoned in the Constitution of 1846, was re-established by the judiciary article of 1869, primarily with reference to the terms of those judges, which by the same article had been extended to the period of fourteen years. FOLGER, J., *People v. Gardner*, 45 N. Y. 819. On this ground it was claimed in the case of *People v. Brundage*, 78 N. Y. 403, that the limitation of age in the 13th section did not apply to county judges whose terms were by the 15th section fixed at six years instead of four years as previously established. The court however resting upon the broad language of the restrictive clause held that county judges were included.

It is however we think quite evident that the limitation does not apply to every officer who is invested with judicial power. It is the "office of justice or judge of any court," which the clause declares shall not be held by any person beyond the age specified. But the judicial function may be vested in a person, to be exercised for certain purposes and on particular occasions, who does not hold the "office of justice or judge of any court," within the meaning of this clause. The Constitution itself furnishes one illustration. The president of the senate, the senators and the judges of the Court of Appeals, comprise the court for the trial of impeachments, created by the first section of the sixth article. But neither the lieutenant-governor, nor the senators, although they act as judges on the trial of an impeachment, "hold the office of justice or judge of any court." The office which the lieutenant-governor holds is that indicated by his title, and so of the senators. The judicial function which they exercise in the particular case is annexed to their respective offices. They sit as judges on the trial

of impeachments, but they do not hold the office of judges while acting as such. We think it plain that they would not be disqualified from acting as members of the court after attaining the age of seventy years, under the clause in the Constitution now in question. Another illustration is furnished in the statutes creating mayor's courts in cities, by which judicial powers are vested for certain limited purposes in mayors and other municipal officers. There is such a court in the city of Hudson, and it may be in other cities, which is held by the mayor, or by the mayor in conjunction with other officers. The mayor in these cases acts as a judge or magistrate, but the judicial function is incident to the office of mayor. He does not hold the office of judge, and if eligible to the office of mayor, although seventy years of age, he may we think discharge the duties connected with that office after that time, including the holding of the mayor's court, without a violation of the Constitution.

Returning to the immediate point now in judgment the question recurs: Does a justice of the peace "hold the office of justice or judge of any court," within the meaning of section 13, article 6, of the Constitution? This office was not created by the Constitution. Justices of the peace had been known to the common law of England for a century and a half before America was discovered. They were in their original institution mere conservators of the peace, exercising no judicial function. It is said in Burn's Justice (vol. 3, 19th ed., p. 4), that by the statute 1 Edw. III, which is the first statute that ordains the assignment of justices of the peace by the king's commission, "they had no other power but only to keep the peace." But from time to time their powers were enlarged, and they came to constitute a very important agency in the administration of local government in England. They discharged a great variety of duties connected with the support of the poor, the reparation of highways, the imposition and levying of parochial rates and other local affairs. See enumeration in stat. 16, Geo. II, chap. 18. They were invested with judicial powers for the first time (it seems) by the statute 34 Edw. III, chap. 1, which gave them power to try felonies, but then only when two or more acted together, and not singly, and it is said by Blackstone (vol. 1, p. 349), "they then acquired the more honorable appellation of justices." I do not find that they ever exercised in England jurisdiction in civil causes.

People v. Mann.

The office of justice of the peace was brought here by the English colonists. From the earliest colonial period it has existed in this country. By the Code known as "the Duke's Laws," for the government of the colony of New York, promulgated in 1665, justices of the peace were commissioned for the towns in the province, with the same powers as in England. The judicial establishment created by "the Duke's Laws" comprised a local court in each town, with jurisdiction of actions of debt and trespass under £5, to be held by the constable and overseers of the town; a court of sessions for each of the three ridings, and a court of assize for the whole province. Justices of the peace were entitled to sit as members of the court of sessions and the court of assize, but not of the town courts. In 1691 the judicial system was reorganized by an act of the colonial legislature. By that act the town courts were changed into courts of justice of the peace, to be held by one justice and two freeholders. It was not until 1737 that a justice of the peace was empowered singly to hold a court for the trial of actions. See Monograph upon the Courts in this State by Chief Judge Daly, preface 1 E. D. Smith; also 3 Daly, Appendix. But from the earliest colonial period until this time, justices of the peace here, as in England, have been invested with various and important functions connected with local administration, quite independent of their judicial authority. A glance at the statutes will show how important a part these officers have had in the administration of the poor laws, the highway acts, the adjustment of town charges, and indeed in nearly every department of local administration. It is important to notice that the judicial function exercised by justices of the peace was a graft upon their original authority, and that the enlargement of their powers has not been in this direction alone, but that by gradual accretion they have come to constitute a most important factor in the corporate administrative life of towns and counties. The gradual growth of their powers and functions furnishes a good illustration of the manner in which institutions grow up and adapt themselves to the changing conditions and demands of society, until they are brought to subserve, in the most effective way, the public interests.

We have failed in the purpose of this brief historical reference to the origin and growth of the office of justice of the peace, unless it shows how widely it differs in the circumstances of its institution and development, and in the variety of its functions, from

the office of judge of an ordinary court. We know, from observation, that justices of the peace are not in common speech known as judges, but are uniformly called by the distinctive title of their office. Unquestionably their jurisdiction as a tribunal for the trial of small causes is now the most important of their functions, but they have never lost their character as administrative officers, and in this respect they occupy a position and character and exercise powers unique, and in many respects quite dissimilar to those exercised by other judicial officers.

An examination of other sections in the judiciary article throws light upon the construction of the 13th section, and furnishes strong ground for an inference that justices of the peace were not intended to be included within the restrictive clause. In provisions intended to apply to judges or justices of inferior courts, and also to justices of the peace, the latter are specially mentioned by their name of office, and their inclusion is not left to inference from general words. The eleventh section of the sixth article, after prescribing how judges of the Court of Appeals and of the Supreme Court may be removed, proceeds as follows: "All judicial officers, except those mentioned in this section and except justices of the peace and judges and justices of inferior courts, not of record, may be removed," etc. The same language is repeated in section 18: "Justices of the peace and judges or justices of inferior courts not of record," etc. Justices of the peace are in a general sense judges of an inferior court, but their special designation in these provisions, by the title of their office, is a recognition in the Constitution itself of their peculiar and distinctive character, and indicates that they were not intended to be included within the general words "judges or justices of a court," as used in that instrument. The provision in the 13th section, that "no person shall hold the office of justice or judge of any court," is to be interpreted in the light of the antecedent and subsequent sections, and so interpreting them, justices of the peace are not, we think, included. There are other considerations which tend to support this conclusion. There was no apparent reason or policy for subjecting justices of the peace to the limitation of age applicable to the general class of judges. Their terms are short and are left by the amended judiciary article as they were fixed by the Constitution of 1846. It does not appear that any public inconvenience had resulted from the absence of a limitation of age applicable to

Nolan v. King.

these officers. Their number, four in each town, afford a reasonable guaranty that the public service will not suffer by a disability of incumbents arising from age, and the easy means provided for their removal would subject the public at most to only a temporary inconvenience. It cannot be claimed that the prohibition in the 13th section would have been applied to justices of the peace if they alone had been in the contemplation of the framers of the judiciary article.

We are of opinion, for the reasons stated, that a justice of the peace does not "hold the office of justice or judge of any court" within the purview of the 13th section. To avoid misapprehension it may be proper to say that we do not intend to decide that the prohibition may not apply to persons in office whose official title is not that of judge. If the office is a judicial one and is created for the exercise by the incumbent of the judicial function — as for example a surrogate, quite other considerations would apply than those which appertain to the case now before us. This case rests upon the dual character of the office of justice of the peace, the essential distinction between his duties and functions and those of any other judicial officer, and upon a discrimination made by the Constitution itself. See *Settle v. Van Evree*, 49 N. Y. 280.

The order of the General and Special Terms should be reversed and the writ dismissed.

Ordered accordingly.

All concur.

NOLAN V. KING.

(97 N. Y. 565.)

Negligence — bridge over excavated sidewalk.

Where one duly licensed by the city authorities has removed a portion of a sidewalk to excavate for a vault, and has built a bridge over the excavation, necessarily higher than the street, he is not bound to make the bridge as safe for travellers as the sidewalk was, but only reasonably safe.

ACTION for personal injury by negligence. The head-note and opinion show the point. The plaintiff had judgment below.

Joseph S. Auerbach, for appellant.

John O. Mott, for respondent.

FINCH, J. The complaint in this action was grounded upon negligence in the construction of the bridge over the vault opening. There is no allegation that its existence was unlawful, or that it constituted an unauthorized obstruction of the street, and so was a wrong, or a nuisance; but on the contrary the complaint assumed a lawful construction, for it was averred that "it became and was the duty of the defendant so to erect and maintain the said bridge, or wooden walk aforesaid, and the approaches or steps leading thereto and therefrom, * * * in good order and in proper and safe condition," and then avers that the structure was built in a careless and negligent manner, and was allowed to fall into and remain in a dangerous state and condition. Upon the trial the plaintiff proved that she fell while descending the steps from the bridge; that those steps were of unequal height and width and guarded by no railing at the side, and after proof of the injury rested her case. The defendant moved for a nonsuit claiming that there was no negligence, which motion was denied. Evidence was then given of the mode and manner of construction; of the permission granted by the department of public works to build the vault; and of the city ordinances relating to the subject; and after a renewal of the motion for a nonsuit, which was again denied, the defendant rested. The court then charged the jury, and submitted to them solely the question of negligence in the construction or maintenance of the bridge; saying explicitly that the defendant under the permit from the department of public works had the right to erect a bridge over the excavation in question, and that no cause of action was shown unless the jury should find the defendant guilty of negligence. Neither side controverted this proposition, or took exception to it; but on the contrary, the learned counsel for the plaintiff in his brief on this appeal expressly says not only "that the case went to the jury on the question of negligence in constructing the steps," but also that "it was tried on that understanding." It will not do now to say that there was no authority for building the bridge at all, and that its very existence was an affirmative wrong for which the judgment may be sustained. That would be extremely unjust in view of the pleadings and the course of trial. We must treat

Nolan v. King.

the action therefore as the parties and the court treated it, as involving only the question of negligence in the construction of the bridge; and so considered, a very important question arises as to the degree of care and prudence in that construction which devolved upon the defendant. The jury were told that "the defendant was under a liability to have the bridge constructed in such manner that the plaintiff would not be subjected to any more personal risk than if the sidewalk had been there instead of the bridge." To this instruction the defendant excepted. The doctrine thus declared was not inadvertent or unintentional. It is repeated not less than six times in the course of the charge and so woven into it as to be its most prominent feature. The jury were told "if in your deliberation you reach the conclusion that this bridge was less safe than the sidewalk would have been, and this lady in passing over it exercised the caution which reasonably prudent men and women exercise in passing over a sidewalk, then you will pass to the consideration of the amount of your verdict." Here again the defendant excepted, pointing his objection to the test of reasonable care on the part of plaintiff supplied to the jury. And to make the true position of the court still plainer, the judge was asked to charge "that if the jury believed the bridge and steps were constructed in a reasonably safe and proper manner plaintiff cannot recover," which instruction was refused and the defendant again excepted. Since walking over an unbroken level is undeniably safer than ascending or descending steps, however carefully constructed, the jury were left to the possibility of an inference that any construction of a bridge above the level of the street involving the presence of steps was negligence as matter of law. It is not at all certain that such an idea was in the mind of the court, and yet the language used was broad enough to cover it, and quite sure to leave a jury in danger of being misled. To its full extent it was approved by the General Term without the least restriction or limitation, and in the respondent's brief on this appeal it is distinctly argued that the cover of the excavation should have been on the level of the old sidewalk, thus dispensing with steps entirely. The doctrine of the charge to its full extent and in its entire scope was defended in the General Term and is sought to be justified on this appeal by a series of decisions in this court. *Clifford v. Dam*, 81 N. Y. 56; *McGuire v. Spence*, 91 id. 303; s. c., 43 Am. Rep. 668; *Wasmer v. D., L. & W. R. Co.*, 80 N. Y.

212; s. c., 36 Am. Rep. 608, n.; *Irvine v. Wood*, 51 N.Y. 224; s. c., 10 Am. Rep. 603.

In the first of these cases a vault was built with an opening in the sidewalk to receive coal, but the cover to the opening, intended to remain there permanently and to constitute a part of the sidewalk, was so imperfectly constructed that it gave way and injury followed. We said that the builder was bound to make the sidewalk as safe as it was before it was excavated. But we did not at all say that he was bound to do that during the process of construction. In the present case the builder was required to restore the sidewalk which he had excavated, to its original safe condition, but that is not saying that he must keep it so during the process of construction.

That process implies and compels a temporary removal of the sidewalk, and either it must be left impassable and guarded and protected as an excavation, or bridged above the sidewalk level so that the work of building or restoration can go on beneath it and without obstruction to the public travel; or at least the question whether consistently with the construction of the vault it was not necessary to build the bridge above the sidewalk level; whether any covering at such level was possible, such as would permit at the same time and with equal safety the work of construction and the passage of the public; and whether, if so, the temporary covering at grade, with the inevitable process of change from stone to wood and then from wood to stone, might not have involved greater risk to the passers-by than the construction of the elevated bridge; all these were questions of fact for the jury and not of law for the court. They were made questions of law by force of the charge which in effect denounced as negligent a construction of the bridge which by reason of its steps was not and could not be made to involve as little risk to the public as the level sidewalk. If that is the law, builders will be compelled to stop passage entirely and turn the public into or across the carriage-way with all the risks and inconveniences which must necessarily result. The second of the cases cited was also that of a vault or area left uncovered and without guard, after the process of construction was ended and when there was nothing to warn the public of possible danger. The third case cited was that of a railroad which had interfered with a public street and failed to restore it to its original or useful condition. In like manner the last case cited was that of a coal

Nolan v. King.

vault left imperfectly covered after the work of construction was complete. All of these cases require of the builder what is possible and what is just, but none of them lay down a rule of law that a rightful removal of the sidewalk to build a vault must, during the temporary period of construction, be accompanied by the presence of a new sidewalk just as safe as the one removed. Practically that is saying that the vault shall not be built, or that while building passage shall be turned into the roadway or across to the opposite walk, a measure palpably as dangerous and even more so than a prudent and proper bridge. In all such cases it is inevitable that the passage of the public temporarily is made less convenient and not so perfectly safe as before the removal of the sidewalk; but if this is done with prudence and care, with good judgment, and properly and attentively, so as not to be perilous to passengers in the street, the builder is not responsible for an accident. The rule applied upon the trial of this case would tend to make impossible any temporary occupation of the street by builders during the process of construction. One who with the permission of the public authorities, without disturbing the sidewalk, piles brick in the roadway, leaving room for wagons to pass, necessarily narrows the roadway, and does not and cannot keep it in as safe condition for the passage of carriages as it was before such occupation. Such an occupation of the street in the city of New York is lawful, *Rehberg v. Mayor, etc.*, 91 N. Y. 143; s. c., 43 Am. Rep. 657, but does not leave the street in as safe a condition for passage as it was before the pile of brick was placed upon it. Such a test cannot be applied. The rule in case of an excavation, duly authorized, is that it shall be carefully guarded so as to be reasonably free from danger to travellers upon the street. *Brusso v. City of Buffalo*, 90 N. Y. 679. If it is covered and the public invited to pass over it, reasonable care requires that it should be so strongly and so prudently constructed as to involve no peril to those passing over it and exercising the ordinary care appropriate to the situation. It is not to be expected and cannot be required that the temporary covering shall equal in safety and convenience the sidewalk removed, or that passengers may cross with as little heed and care as upon the completed pavement, and the duty of the builder is not to be thus measured until his work is done and opened to public passage as a completed sidewalk. The necessities of building involve some inconvenience to the public. Temporarily it must be

Nolan v. King.

borne in view of the other public benefit resulting from freedom of construction, and where it occurs the traveller is bound to observe its presence and give to his passage some of the care and observation which he may assume to be unnecessary upon the completed sidewalk. But if the builder opens his covering to the passage of the public although only as a temporary substitute, he must be deemed to declare it safe and free from peril to persons crossing with such ordinary prudence and care as the presence of the temporary structure requires; and so he must build it with so much of care, and skill, and prudence as will reasonably protect the passers from peril and enable them with some ordinary attention to their steps to pass it with safety. The necessity is exceptional upon both sides. In the present case the steps were of unequal height and width, and there was some evidence that they were guarded by no side rail, and the question of negligence should have been presented to the jury upon all the facts and circumstances of the case, but without setting up the removed sidewalk, and passage over it as the measure of the builder's duty and the traveller's care.

For this error the judgment should be reversed and a new trial granted, costs to abide the event.

Judgment reversed.

All concur, except DANFORTH, J., dissenting.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BEAVER V. BARE.

(104 Penn. St. 58.)

Infancy — emancipation — evidence of.

The minor son of one of the partners in a firm was apprenticed to the firm, and remained until after the firm made a general assignment for creditors. No express emancipation of the plaintiff was shown, but a separate wages account was kept by the firm in the son's name; the wages were not credited to or claimed by the father; the minor drew a small sum on account of his wages; and he received from the assignee his wages earned after the assignment. *Held*, in an action by the son after majority, that the question of emancipation was for the jury.*

ASSUMPSIT. The head-note states the case. The plaintiff had judgment below.

John Stewart and F. M. Kimmell, for plaintiff in error.

J. McD. Sharpe and Joseph Douglas, for defendant in error.

CLARK, J. The exercise of parental authority is not necessarily for the profit of the parent, but for the advantage of the child; the

* See 85 Am. Rep. 117.

duty of service by the child, being deemed necessary to the proper exercise of parental authority, for its own good. Although we still recognize the right of the father to the personal services of his children, that right is simply incidental to the duty of the father to discipline and direct them; his right to personal custody and personal service is secured to him therefore in order that through them, prompted by natural affection, he may successfully impart to them habits of industry, methods of thrift and the means of personal success in life. Children are therefore not the mere servants of the father, nor is he bound to work them, as such, for the benefit of his creditors (*McCloskey v. Cyphert*, 27 Penn. St. 220); he may let them go free from his service, when he chooses, no matter whether he be solvent or insolvent. *Holdship v. Patterson*, 7 Watts, 547; *Brown's Appeal*, 86 Penn. St. 524. The right to their service, being merely for their good, whenever the father finds their interest or his own better subserved by their emancipation, he can liberate them. This emancipation may be as perfect when they live together, under the same roof, as if they were separated; for although the father thus relinquishes his right to their services, as a means of discipline, the duty of discipline still remains, and this duty can be better exercised in the family than elsewhere. *McCloskey v. Cyphert*, *supra*; *Rush v. Vought*, 55 Penn. St. 437.

In *Brown's Appeal*, 86 Penn. St. 524, this principle was fully recognized, and it was there held, that the services of a son, rendered during minority, under a contract previously made with his father, was a valid consideration for a judgment confessed, as similar services rendered under a contract made afterward, and that both, or either, were sufficient to sustain the judgment even as against creditors. Thus then it appears, that a father may not only relinquish his right to the wages of his minor son's labor, but he may, even as against his creditors, bind himself to pay his son for such services, pursuant to a contract previously made. If however the contract had not been made previous to the service, neither could the son recover for his labor, nor would a voluntary judgment, given by an insolvent man on such a consideration, be of any validity as against creditors. *Hack v. Stewart*, 8 Penn. St. 213.

Therefore we infer, that whilst the right of a father to the actual custody and services of his minor children is not, as such, an absolute or vested right, yet his right to wages for their labor is absolute and vested, if that labor has been performed without any previous

Beaver v. Bare.

act, agreement, or understanding otherwise. Of course he may, without intent to hinder, delay or defraud creditors, assign or relinquish this debt as any other. In the case of *Kauffelt v. Moderwell*, 21 Penn. St. 222, we held, that when a minor is permitted by his father to make his own contract for services, it is fair to presume that he is allowed also to receive the wages for himself, and so the law implies the contract, until a contrary purpose appears; but it is not so when the father makes the contract. "He has the right to command the services and receive the wages of his minor son, and when he makes a contract for them, there is no ground for the presumption that he is acting as an agent of his son, or that the other party knows it, and intends the contract to be with his son; and therefore the law cannot imply that such was the contract, as matter of fact, or impose it as a matter of duty. The private arrangements between the father and son, in this case, was a matter of their own, which constitutes no part of the transaction, and which is indeed revocable at the father's pleasure. To allow the recovery by the son in such a case might defeat just claims of Kauffelt against the father."

Was there any relinquishment by John Bare of the services of his son, previous to his entering the employment of this firm, or at any time during its continuance or afterward prior to the assignment? If not, then the father's right to these wages was vested and absolute, at the assignment, and that right, passing under it, vested in his assignee for creditors. The paper dated 30th October, 1882, is of no avail for the purpose intended; it came too late; that which he released or relinquished to his son, he had previously transferred to his creditors. This case should have been submitted to the jury, on the question of emancipation, which was practically withdrawn from the jury in the trial below. "No evidence of that sort," says the court, "was offered, so far as his wages were concerned, that he was allowed to receive his wages himself. I saw no evidence at all of that, in the case, the wages therefore at the time they were earned were by law due to the father."

This was a practical withdrawal from the jury of that branch of the case; there was, we think, some evidence for the jury on this question. The account for these services was in the name of the son, not in the name of the father. No credit was given to the father for them, and the books were open to all the members of the firm. The plaintiff's charge for labor embraces two years and nine

 Gilbert v. Moose.

months, in which time there was no proof that the father claimed the benefit of them, whilst the son received all that ever was paid; he continued to labor after the assignment was made, during minority, and received to himself wages from the assignee. These circumstances, taken with the testimony of the son, were certainly proper matters for the consideration of the jury; their weight, when taken with the fact that the contract was made by the father, and with other circumstances in the cause, was for the jury. What effect they might have had upon the minds of the jury is not for us to say, but we think the court was in error in saying that there was no evidence on the subject.

Judgment reversed and a venire facias de novo awarded.

 GILBERT V. MOOSE.

(104 Penn. St. 74.)

Insurance — life — interest — assignment.

A. insured his life for the benefit of B., who had no insurable interest. B. assigned the policy during A.'s life to C., who had no insurable interest. C. paid assessments, and on A.'s death collected the insurance. *Held*, that A.'s administrator could recover the same from C., less the assessments.*

DEBT for money had and received. The opinion states the case. The plaintiff had judgment below.

David Wills and Edw. J. Cox, for plaintiff in error.

R. G. McCreary, for defendants in error.

GORDON, J. Jacob Moose, in his life-time (August 17, 1880), made application to the Southern Pennsylvania Relief Association, of Hanover, York county, for an insurance on his life, and upon this application a policy, or certificate of membership, as it is called, in the sum of \$2,000, was issued for the benefit of one Peter Jacobs, an alleged grandson of the assured. It turns out however that Jacobs was in no way related to Moose, being but the son of a son's wife, hence having no assurable interest in the life

* See *Missouri Valley Life Ins. Co. v. Sturges* (18 Kans. 93), 26 Am. Rep. 761.

Gilbert v. Moose.

on which the policy was issued. On the 31st of August following the date of the certificate, Jacobs, for the consideration of \$28, assigned to John G. Gilbert, the defendant, by whom all subsequent assessments made by the company, were paid. On the 3d of April, 1881, Jacob Moose died, and the defendant received from the company on the policy some \$356. It was for this sum of money, or the balance of it after deducting the assessments and other expenses paid by Gilbert, that this suit was brought. The court below, after hearing the evidence, directed the jury to return a verdict for the plaintiffs, and reserved the following point: "Whether or not the assignment being made upon the consideration of the payment of \$28, the assignee having no interest in the life of the assured, and having taken the assignment for the purpose of speculation only, is entitled to retain the money received on the policy as against the personal representatives of the deceased, beyond the amount of the consideration, fees and assessments paid to the association." Afterward on argument the court entered judgment on the verdict for the plaintiffs. We are thus at once brought face to face with the question, really the only one in the case: Can one having no interest in the life assured, and for the purpose of speculation only, acquire, by assignment or otherwise, such title to the policy as the law will enforce?

It was held by this court as early as 1803, in the case of *Pritchett v. Insurance Company*, 3 Yeates, 458, that every species of gaming contracts of insurance, wherein the insured has no interest in the subject-matter of the policy, or one only colorable, is, in this Commonwealth, without the sanction of either law or usage; that such contracts are mischievous and dangerous to the interests of trade, commerce and society, and are to be reprobated rather than encouraged by our courts. The very same view of this subject is adopted in *Edgell v. McLaughlin*, 6 Whart. 176; 36 Am. Dec. 114, and it was there said that no kind of wager had ever been recoverable in the courts of Pennsylvania. So also in the case of *Adams v. Insurance Company*, 1 Rawle, 97, it was asserted that in this State a gaming policy cannot be enforced. We need not stop to consider at length the principles upon which these decisions rest, for they must be obvious to every sound moralist. The gambler is, as a rule, reckless and dangerous, and seldom hesitates at the means necessary to secure his bet. We have within our own knowledge a case in which a wagering policy on a life resulted in murder.

So far however as the policy itself is in this case concerned, we must take it as valid; nothing to the contrary appears from the evidence, and its validity seems not to have been questioned in the court below. The sole inquiry then is, to whom do the proceeds belong? Was the court right in holding that they could not go to Jacobs, the beneficiary named in the certificate, or to the defendant, his assignee, because of their want of interest in the assured life? If so, judgment was properly entered for the plaintiffs, for in that case the beneficial interest in the risk remained in Jacob Moose and the representatives of his estate. We do not overlook the fact that the status of Jacobs is the point of this case, for if he was the proper and lawful beneficiary, then even were Gilbert without right, the plaintiffs could not recover, for the proceeds of the policy would belong to Jacobs, and on the other hand, if his claim was not good he had nothing to assign to the defendant. But as a beneficiary merely, having no interest in the life, it seems to us very clear that he could lawfully have no interest in the policy. For if we admit the contrary; if we admit that one man may insure his life for the benefit of another, who is neither a relative nor a creditor, our whole doctrine concerning wagering policies goes by the board. The very foundation of that doctrine is that no one shall have a beneficial interest of any kind in a life policy who is not presumed to be interested in the preservation of the life insured. But in the case supposed the presumption is inverted; the beneficiary is directly interested in the death of the assured. Moreover if such a transaction were permitted, the wager could always be concealed under the mere form of the policy. Nor can we see that did the defendant's case depend on an assignment directly from Moose to himself, how it would be bettered in the least. The reserved point alleges that Gilbert took the assignment for the purpose of speculation, and of this there can be no doubt, for for what other purpose could it have been taken? But speculation on what? The life of Moose, and the sooner that was determined the better the speculation. If there is any difference between this and an original wager policy, I confess I cannot see it. Under the case put, Gilbert, as assignee, undertakes to pay the assessments; he pays one, say for example, of \$10, and the sole and only consideration for that payment is the chance that the life may fall in before the next assessment, and that for his \$10 he may get \$100 or perchance \$1,000. Between this and the bet in the case of *Phillips v. Ives*, 1 Rawle,

Gilbert v. Moose.

36, on the life of Napoleon Bonaparte, we can see no material difference. Both are wagers, and both dependent on the contingency of a life. No semblance of authority from either Pennsylvania or Federal courts has been adduced in support of the position assumed for the plaintiff in error, except a dictum of Judge SHARSWOOD, then president of the District Court of Philadelphia, in the case of *Insurance Company v. Robertshaw*, 26 Penn. St. 189. Not only is the case itself very far from being in point, but even the language cited was intended to have no application to a case like that in controversy.

The position assumed by the learned judge is that where a policy is *bona fide* and founded upon an insurable interest, the assignment or gift of it, to a friend or other person, is no fraud upon the insurance company by which it was issued. This however is a position not controverted in the suit now under consideration. Therefore admitting this dictum to be authority in a case proper for its application, it is certainly not so in the case in hand.

When we pass from our own courts to those of neighboring States we find such difference in the decisions upon this subject that as authority they afford us little or no help in the way of a definite conclusion. In Rhode Island, *Clark v. Allen*, 11 R. I. 439; s. c., 23 Am. Rep. 496, it has been held that the assignment of a life policy to one having no interest in the life insured is good. On the other hand, in New York, in the case of *Ruse v. Life Insurance Co.*, 23 N. Y. 516, the doctrine appears to be, and this independently of the statute of that State avoiding wagering contracts of every sort, that a policy obtained by a party having no interest in the subject matter of the insurance is a mere wager and void. Opposed to this we have the case of the *Trenton Mutual Life and Fire Insurance Co. v. Johnson*, 4 Zab. 576, where it was determined that it was not necessary for the plaintiff in an action on a policy on the life of another to show that he had an interest in such life, and this, as it appears, on the ground that wagers on indifferent questions are not prohibited by the laws of New Jersey. But we abstain from further citation of these conflicting opinions, since it involves but useless labor, and turn to the federal decisions, which next to our own are of the most value in our discussion. Of these we have two directly in point: *Cammack v. Lewis*, 15 Wall. 643, and *Warnock v. Davis*, 14 Otto, 775. In the first of these the facts are briefly as follows: Lewis insured his life for \$3,000 and

assigned the policy to Cammack to whom he owed \$70. Cammack paid the first year's premium, and upon the death of the assured, some seven months afterward, received from the company the amount due on the risk. Of this he paid \$1,000 to Mrs. Lewis and kept the balance. To recover this money suit was brought against Cammack by the administrators of Lewis, and it was held that they could recover the whole amount received by the defendant less premiums by him paid and other just offsets. In the opinion, which was delivered by Mr. Justice MILLER, it was said that the transaction with Cammack was a wager; that the disproportion between the debt and the amount received by him deprived the matter of all pretense of being a *bona fide* effort to secure a debt; that the strength of this proposition was not diminished by the fact that Cammack was to get but \$2,000 out of the \$3,000, nor was it weakened by the further fact that the policy was taken out by Lewis and assigned to Cammack. In the second case the facts were that the decedent had in his life-time agreed with the defendants to procure a policy on his life, they to pay the fees and assessments, and on his death to be entitled to nine-tenths of the insurance. In pursuance with this arrangement a policy was procured and assigned to the defendants, who after the death of the assured received from the insurers nine-tenths of the amount due on the policy. Here again it was held on suit by the administrators of the estate of the assured that they were entitled to recover the money received by the defendants on the said policy.

In the opinion delivered by Mr. Justice FIELD, the case of *Cammack v. Lewis* is approved and cited as sustaining the doctrine that the assigning of a policy to a party not having an insurable interest in the life is as objectionable as though the policy were taken in the assignee's own name.

These authorities in connection with our own remove all hesitation concerning the rectitude of the judgment of the court below.

If however the question were one of first impression and to be settled on the ground of public morality and judicial policy, we could hardly fail to reach the same conclusion. So fraught with dishonesty and disaster, and so dangerous even to human life has this life insurance gambling become that its toleration in courts of justice ought not for one moment to be thought of.

Judgment affirmed.

Sankey v. McElevey.

SANKEY V. MCELEVY.

(104 Penn. St. 265.)

Statute of limitations — fraud.

Where a debtor disclosed to the administrator of his creditor the fact of his indebtedness, but omitted to state the amount, this is not such fraudulent concealment as will toll the statute of limitations.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

D. B. Kurtz and *E. T. Kurtz*, for plaintiff in error.

R. B. McComb, for defendant in error.

GREEN, J. This action was brought in 1882 upon a note given on April 15, 1848, thirty-four years after the cause of action accrued. To the plea of the statute of limitation it was replied that the defendant had been guilty of such fraud as to prevent its operation as a bar. The alleged fraud consisted in withholding full information as to the true amount of the debt. The payee of the note, R. W. McElevey, died in 1849. Administration upon his estate was granted on August 22, 1849, to his brother John McElevey, the present plaintiff. On June 25, 1850, David Sankey, the defendant, executed and delivered a deed to Amanda McElevey, a sister of the payee, for lot No. 39 in New Castle, for the nominal consideration of \$1,000, alleging that the conveyance was made in pursuance of a contract between him and the payee that he would convey the lot to Amanda in discharge of indebtedness for money borrowed by the defendant from the payee. The defendant alleged, and testified that he informed the parties, including Amanda and John and their mother Sarah, of the whole transaction, stating the whole amount of the debt. At the time of the trial, and long before this action was brought, Sarah, the mother, and Amanda were dead. John being alive testified that the amount of the loan was not stated by the defendant when the deed was made, and the court left to the jury the question whether the defendant's allegation on that subject was true, charging that if it was not, his conduct was such a fraud as would toll the statute. In this we think there was error.

Sankey v. McElevey.

The learned judge charged the jury that there was no obligation on the part of David Sankey to make known the fact of his indebtedness, and that if he had said nothing the action would have been barred. But he said if the defendant did speak at all he was bound to tell the whole truth, and for not doing so he forfeited the protection of the statute. It is difficult to understand upon what principle this theory can be sustained. We are not furnished with a single authority either by the learned judge of the court below, or by the counsel for the plaintiff, the defendant in error, in support of this proposition, and it seems untenable. If it be conceded, as indeed it is, and must be, that the relation of debtor and creditor merely is not a relation of trust and confidence, imposing upon the debtor the duty of information either to the creditor or his representative, of the fact and extent of his indebtedness, and therefore that he is guilty of no fraud if he withholds all information, how can he be guilty of fraud if he does impart some information and withholds only a part? To so hold would seem to be making the less greater than the whole. According to the doctrine of the court below the defendant was under no obligation to inform the plaintiff of the fact of his indebtedness to the intestate, and if he gave no information at all, said nothing whatever upon the subject, he was guilty of no fraud, and his plea of the statute would be a perfect bar. But if he did tell the plaintiff that he owed the intestate, but did not tell him how much he owed him, then he was guilty of fraud and cannot have the benefit of the statute. In this case the plaintiff admits that in 1850 when the defendant made the deed to Amanda for the lot, he did tell him he had borrowed money from Robert McElevey and that he was to make a deed to Amanda, but that he did not name the amount. He testified thus: "He (Sankey), made the remark to me shortly after I took out letters of administration, that he had borrowed a certain amount of money not naming the amount, from my brother, saying it was the desire of Robert that he should make the title to Amanda for the consideration of \$825 or \$850, he said to me for the lot, or the same amount which he claimed was bid off in Mercer county. Q. Robert McElevey was to have credit for it? A. Yes, sir. Q. With the amount? A. Yes, sir; it was \$825.50. Mr. Sankey said to me that was to be the amount that he was to deed the lot to Amanda for. Q. How did the amount come to be mentioned or alluded to in that conversation? How did he come to refer to the amount in dollars

Sankey v. McElevey.

and cents? A. I don't recollect that that was the amount. He said he had borrowed some money from Robert not naming the amount. This was in 1849 and the deed was not made out for more than a year after that, and the deed was made in my presence to me and signed in my presence by his wife and him. I found the deed to be a thousand dollars, and I said to Mr. Sankey, 'This cannot be possible, for I got information from you that it was to be \$825 or \$850 or whatever the amount was that was knocked down by the sheriff in Mercer county,' and I took exception to putting it at \$1,000 at the time. He gave me no information at all. Q. Did he say any thing about how much he got from Robert McElevey? A. No, sir; he never told me or any one else, and I guess he didn't know himself."

In view of this testimony it is amazing that the plaintiff did not ask the defendant how much he borrowed from Robert. He gives no explanation of his omission to make this inquiry, nor does he at all allege that the defendant gave him any false amount as being the sum borrowed. Where then is the fraud? It was the right of the plaintiff to request and insist upon exact information, and if it was not furnished he could have commenced appropriate proceedings at once, when the facts were of recent occurrence and parties and witnesses were living. He knew the fact of indebtedness, for the defendant had himself informed him of it. He knew that the defendant alleged that the deed was to be made on account, or in payment of the debt, for that also the defendant told him. Yet he makes no further inquiry, though his attention was attracted to the subject of amount by a discrepancy between the sum named in the deed and a different sum which he said had been named by the defendant as the intended consideration. He commences no proceedings but lies by for thirty-two years after the most material facts were disclosed to him by the defendant, and then brings suit because the amount of the loan and the fact that a note had been given were not disclosed to him. Without any confidential relation existing between them, without any affirmative act of fraud or misrepresentation, without having parted with any property or right in consequence of any falsehood or deceit of the defendant, he now after a delay of nearly a third of a century seeks to compel the payment of a debt founded upon an ordinary loan of money, and in a common-law action, by one who owed him no duty of information, yet did inform him of every ma-

terial fact which would have established his liability. The only omitted fact is one which would determine merely the pecuniary extent of the liability, but of that fact the plaintiff was necessarily put upon inquiry when the other facts were communicated to him. It is certainly not the law that one who is merely a debtor to another is bound to inform the creditor of the fact of the indebtedness. Nor if the creditor dies, does such a duty arise in favor of his legal representative. Hence there is neither fraud nor breach of trust on the part of the debtor in failing to impart such information.

It was held in *Barton v. Dickens*, 48 Penn. St. 518, that the trusts not reached or affected by the statute of limitations are those technical and continuing trusts which are not cognizable at law but fall within the proper and exclusive jurisdiction of a court of equity. On page 523 AGNEW, J., said: "Analogies if resorted to are adverse to the opinion of the court below; as where the fiduciary relation ceases to exist at a known period, or where the relation is such as to put the plaintiff upon inquiry and demand. Thus the right of action of a ward against his former guardian is barred after six years from his arrival at age." In *Campbell v. Boggs*, id. 524, it was held that the statute of limitations begins to run in favor of an attorney in fact, and even of an attorney at law, for not paying over money collected, from the time of collection and not from the time notice is given of the receipt of the money.

It is true that where a plaintiff has been kept in ignorance of a cause of action by the actual fraud of the defendant, the fact of the fraud is a good reply to the plea of the statute. This was the case in *Bricker v. Lightner's Ex'rs*, 40 Penn. St. 199, where the defendant snatched the notes in suit from the desk of the deceased payee on the morning after his death, and thereby concealed the knowledge of them from his representative. It was the positive fraudulent act of the defendant which deprived him of the benefit of the statute. So also the mere fraudulent concealment of a cause of action by the debtor, if it be by means of an affirmative act, may operate to prevent the bar of the statute. As in the case of *Wickersham v. Lee*, 83 Penn. St. 416, where the plaintiffs were misled by false information given them as to the collection of a claim which had been intrusted to the defendants. The plaintiffs had constantly applied for information and that which they received was not true in fact. In the opinion it was said: "So long as they (the agents) give him

Sankey v. McElevey.

(the creditor) to understand that his claim is uncollected he is put off his guard. The duty of inquiry lies on him but having made inquiry of his agents and being misinformed by them they cannot set up the statute, when they have misled him and thereby induced him to delay his action." The same doctrine is well illustrated in the case of *Ferris v. Henderson*, 2 Jones, 49, where there was actual fraud and fraudulent concealment by means of false affirmation as to the plaintiff's condition of servitude, in consequence and by means of which he was deterred from bringing his action for many years, and it was held these facts constituted a good reply to the plea of the statute.

The subject of fraudulent concealment of a cause of action was very fully considered in the case of *Troup v. Smith*, 20 Johns. 33. It was there held that in an action of assumpsit for negligence, want of skill and fraud in the performance of work, the defendant having pleaded the statute of limitations, the plaintiff could not reply a fraudulent concealment of the badness of the work by the defendant so that the plaintiff did not discover the fraud until within six years of the commencement of the work, so as to deprive the defendant of the protection of the statute. The same rule was held in the cases of *Smith v. Bishop*, 9 Vt. 110; 31 Am. Dec. 607; *Fee v. Fee*, 10 Ohio, 469; 36 Am. Dec. 103; *Allen v. Mills*, 17 Wend. 202; *Bains v. Williams*, 3 Ired. 481. The doctrine is specially applicable in common-law actions in which the courts hold themselves bound by the explicit provisions of the statute of limitations. But even in courts of equity we apprehend that there must be some relation of trust and confidence between the parties imposing a duty to give information or some affirmative act of fraud, something more than mere silence, which will suffice to defeat the operation of the statute, where the basis of the reply to the statute is concealment of the cause of action. In the recent and very excellent work of Wood on Limitation of Actions, at p. 586, § 274, the subject of the effect of fraud on the operation of the statute of limitations is very fully and ably presented. He shows that in some of the States it is expressly provided by law that the fraudulent concealment of a cause of action shall be a bar to the running of the statute, except from the time of its discovery. As to these he says on page 590, section 276, "The provision that if a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto the action may be commenced at any time

Pittsburgh Southern Railway Company v. Taylor.

within the period of limitation after the discovery of the cause of action, applies to causes of action for fraud, as well as to other causes of action; but the concealment contemplated by the statute is something more than mere silence; it must be of an affirmative character and must be alleged and proved so as to bring the case clearly within the meaning of the statute."

[Omitting a minor point.]

Judgment reversed.

PITTSBURGH SOUTHERN RAILWAY COMPANY V. TAYLOR.

(104 Penn. St. 303.)

Negligence—contributory—obstruction to highway.

The defendants' cars had run off the track at a highway crossing. The plaintiff undertaking to drive a horse over the crossing, the horse showed fright at the upturned cars, but the plaintiff persisted, the horse ran and the plaintiff was injured. There was another road near, which the plaintiff might have taken. *Held*, that he was guilty of contributory negligence.*

ACTION for personal injuries by negligence. The head-note states the point. The plaintiff had judgment below.

George W. Guthrie and *W. F. Wright*, for plaintiff in error.

Boyd Crumrine and *J. F. Taylor*, for defendant in error.

PAXSON, J. In the court below the plaintiff claimed damages from the Pittsburgh Southern Railway Company, for personal injuries to himself and wife consequent upon the alleged negligence of the company in allowing two of its cars to remain off the track an unreasonable length of time at the crossing of a public highway, thereby causing plaintiff's horse to take fright and run off, breaking his carriage and harness, and inflicting serious personal injuries upon his wife and himself.

It appears that on Sunday night, December 15, 1879, a train of defendant company's empty flat cars was being backed down its road to the Enterprise Coal Works, some three miles distant. It

* See *Town of Albion v. Hetrick* (90 Ind. 545), 46 Am. Rep. 230; 47 id. 744.

Pittsburgh Southern Railway Company v. Taylor.

was a dark, stormy night, and when the train reached the place where the Pittsburgh and Washington turnpike road crosses the railroad, three of the cars ran off the track and were overturned. An effort was made by the train hands to get the cars back on the track, but they only succeeded with one of them. The other two were not removed until the following Saturday. There was a fill of several feet in the turnpike road to enable it to cross the railroad, and up the slope caused by the fill, the carriage-way was narrow, say ten to twelve feet in width. The two cars left were overturned mostly outside of the limits of the turnpike road, and wholly outside the travelled portion of it. The plaintiff was a farmer living about half a mile from this crossing. The morning after the occurrence he started with his wife to drive over this road in a wagon with one horse. He had previously been informed of the accident by Mr. Hughes, a neighbor, as will appear by the following extract from plaintiff's own testimony: "He (Hughes) told me there was some cars off the track, and that his horse had frightened at them, but I did not pay much attention, for I did not know any thing about the position of them, and I did not care very much, for I thought I had as quiet a horse as was in the country. * * * I did not think there was any danger at all, I thought the horse was so very quiet." It also appeared that the plaintiff might have avoided the crossing by a way through one of his fields; one of the witnesses did so. When the plaintiff approached the crossing, the following is what occurred, taken from his statement on the witness stand: "When I came here the horse stopped, as I said before; my wife wanted to know if she would get out; I told her I thought there was no danger, and I took the horse by the bit and walked rather before the horse, because if you lead a horse up to a thing he has more confidence; he kept his eye kind of on this obstruction, but did not appear to make any fuss, and followed me right up; just about the time the wheels got over the railroad track I stepped from before him to the side of him, but never unloosed my hold, but still had tight hold of him; just about the time the wheels got across, and as he stepped to one side, he kind of turned to me and threw up his head and leaped right off; I never saw such jumping; I held on to him; the ground was very steep, and I had not much more than this much room to hold the horse, and I could not have held him any how; my wife held on to the reins, and I held on, and we went down over this bank, and after we got down over this

Pittsburgh Southern Railway Company v. Taylor.

steep part to where it was level, and I got him a little to one side, I suppose my arm broke and then the horse ran away; the horse ran about thirty rods on the straight road; there was another road came in there, and he turned off the main road and took through a post-and-rail fence; one wheel caught on the fence and the horse burst right through and broke every thing to pieces, and my wife fell among the fragments; I have no recollection of falling but I got up and ran as fast as I could." Upon cross-examination he said: "I did not say to John Slater or any other person that the horse did not scare at the cars; I said he scared at something; the horse knew that thing was back of him as well as I did, and he watched it all the way across; I said that he might have taken fright at the buggy and thought it was that thing after him; he might have thought the top of the buggy was the thing that he was afraid of; I was surprised as much at the horse scaring as any person."

The jury found a verdict for the plaintiff. Seventeen assignments of error were filed to the rulings of the court below. The questions involved in said assignments will now be considered.

[Omitting other points.]

The defendant's seventh point raised the question of contributory negligence, and the learned judge was asked to say: "That if the jury find from the evidence in the case that plaintiff knew that the cars were off the track at or near the crossing; that the cars as placed were calculated to frighten ordinarily quiet or gentle horses; that as plaintiff approached the crossing his horse showed that he was afraid of the cars; that plaintiff had another road, which was safe and convenient, by which he could have pursued his journey, it was contributory negligence on his part to persist in attempting to pass, and he cannot recover in this action." This point the learned judge refused, saying, "The plaintiff had a legal right to pass over the highway, and if he used due precaution in passing the defendant's cars in order to prevent an accident, he was not guilty of contributory negligence."

The abstract right of the plaintiff to pass along the highway notwithstanding the obstruction is admitted. It is not necessarily involved in the case. It is outside of the true question. A man is as much bound to avoid a known danger on a public highway as anywhere else. Such obstructions are always liable to occur; the person or persons by whose negligence they have been placed there or suffered to remain may be liable in damages to the parties in-

Pittsburgh Southern Railway Company v. Taylor.

jured thereby where they have used reasonable care to avoid such injury, but it would be a harsh rule to hold that because a man has a right to pass along a public road he is under no duty to avoid a known danger; such is not the law. The contrary was ruled in *Forks Township v. King*, 84 Penn. St 230. In that case the plaintiff brought an action against the township for injuries received under the following circumstances: In descending a mountain four or five miles from Forksville, along a dug way, the wagon slid off the road, dragging the horses with it, and the mare of the plaintiff was killed, either by the fall or by choking to death before she was extricated. The road was ten or twelve feet wide, and the upper side was from six to ten inches higher than the lower, with a uniform descending inclination from the bank to the edge on the lower side. At this point there were no guard logs along the edge for a distance of thirty or forty feet. There was a spring on the upper side with a sluice way across, partially stopped up, and the water flowed over the highway and froze on the surface. Rain had fallen the day before the accident, the weather had become suddenly cold and ice had formed to an extent to make travelling dangerous. For ten days previously however there was evidence that ice had been accumulating, and it was alleged that the duty of the supervisors to keep the highway in a safe condition had been wholly neglected. On the trial the court admitted evidence that plaintiff knew of the condition of the road, but rejected evidence to show that he also knew of another road which he might have travelled with safety. The rejection of the latter evidence was assigned for error in this court, and the judgment was reversed wholly upon that ground, Mr. Justice WOODWARD saying: "A person who knows of a defect on a highway and voluntarily undertakes to test it, when it could be avoided, cannot recover against the municipal authorities for losses incurred through such defect. Whart. Neg., § 440. Thus if it appear that there is danger of treading on a piece of ice, and the plaintiff voluntarily and unnecessarily undertakes to walk over it, when he could plainly see it and easily avoid it, and falls and breaks a limb, he is precluded from recovery. *Durkin v. City of Troy*, 61 Barb. 437."

In the later case of the city of *Erie v. Magill*, 101 Penn. St. 616; 47 Am. Rep. 739, the same doctrine was re-asserted. There a foot passenger in the streets of a city attempted to cross a high ridge of snow, very slippery on the surface, which sloped at an acute angle across a

sidewalk into the street. While making this attempt she fell and sustained severe injuries. The undisputed evidence showed that the ridge had existed for about three weeks prior to the accident and that it was commonly regarded as dangerous. Many passers-by were in the habit of turning out into the street to avoid it. The foot passenger in question had previous knowledge of the condition of the ridge, and it was in the day time that she attempted to cross it. In an action brought by her against the city to recover damages for her injuries it was held by this court: 1. That the plaintiff had been guilty of such contributory negligence as to preclude her right of recovery, and that the jury should have been so instructed; and 2. That it was error in such circumstances to leave the question of contributory negligence to the jury. The opinion of the court was delivered by our brother, GREEN, who cited several authorities which fully sustain the text, amongst which may be mentioned *Wilson v. City of Charleston*, 8 Allen, 137; *City of Centralia v. Krouse*, 64 Ill. 19, and *Butterfield v. Forrester*, 11 East, 60. It was said by Lord ELLENBOROUGH in the latter case: "A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right."

The plaintiff knew when he started for this crossing that the cars were overturned by the roadside. He further knew that a neighbor's horse had taken fright at the cars that morning. By crossing one of his own fields he could have avoided the danger without inconvenience to himself. Why did he not do so? The answer is plain from his own testimony already cited. He trusted to his horse; he did not believe there was any danger. "I did not think there was any danger at all; I thought the horse was so very quiet, I was surprised as much at the horse scaring as any person." So that it appears from the plaintiff's own statement that although he knew the overturned cars were likely to frighten horses, and had in point of fact done so that morning, yet he did not regard the running away of his horse, the destruction of his wagon and the injuries to himself and wife as the natural and probable consequences to be apprehended from the obstruction. How then can he allege that the defendant company should have known it? For unless he can establish this he cannot recover. In determining what is proximate cause the true rule is, that the injury must be the natural and probable consequence of the negli-

Pittsburgh Southern Railway Company v. Taylor.

gence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act. *Railroad Company v. Kerr*, 60 Penn. St. 353; s. c., 1 Am. Rep. 431; *Railroad Company v. Hope*, 80 Penn. St. 373; s. c., 21 Am. Rep. 100; *Hoag v. Railroad Company*, 85 Penn. St. 293; s. c., 27 Am. Rep. 653. The soundness of this rule has not been questioned, and I know of no case to which it can be applied with greater propriety than to accidents resulting from the fright of a horse. If we concede the right of action to exist for such a cause, we must be careful not to relax the rules of law applicable to cases of negligence, otherwise we shall have a principle which if once established will, in my judgment, be found difficult to confine within reasonable limits. The frightening of a horse is a thing that cannot be anticipated and is governed by no known rules. In many instances a spirited road horse will pass in safety an obstruction that a quiet farm horse will scare at. A leaf, a piece of paper, a lady's shawl fluttering in the wind, a stone or a stump by the wayside will sometimes alarm even a quiet horse. I may mention by way of illustration that the severest fright I ever knew a horse to feel was caused by the sunlight shining in through the window of a bridge upon the floor. As a general rule a horse will shy at what he is not accustomed to seeing. As was said by a witness in this case: "A horse is more apt to scare at things out of place or that he is not used to." Other witnesses said: "It was an unusual thing there, sticking up so high," and gave that as the reason for the scare of the horse. The difficulty of dealing with a question of this kind in a practical way is apparent. An illustration of it may be found in the answer of the court to the defendant's eighth point. By said point the learned judge was asked to instruct the jury: "That if the jury believe that the horse had safely passed the cars; that the immediate cause of the runaway was the horse being frightened by the carriage top or some object other than the cars, defendant is not liable in this action." This point was answered as follows: "If the cars had nothing to do with the horse taking fright in the first place the position assumed in this point would be correct. But if he was frightened by the sight of the cars and afterward increased by his mistaking the carriage top or some other object for the cars, and then in his terror broke away from the plaintiff, the company would be liable."

This was throwing a question of fact into the jury box which by

Bruce v. Reed.

no possibility could be determined by them except by a guess. The horse had passed the obstruction in safety, and according to the plaintiff's own statement without being seriously alarmed. He then saw the carriage top or something else and commenced jumping. How was it possible for the jury to ascertain the mental operation of the mind of the horse, whether we call it instinct or reason? There is no method for photographing such a thing, and the horse itself was an incompetent witness. No question of fact is too difficult for a modern jury, but a fact found without any means to ascertain it correctly is not entitled to much weight. The moment we reach a point in the trial of a cause where a question of fact becomes vital, and from the nature of things there is no method known to the law by which such fact can be correctly ascertained, it is time for us to pause and examine our bearings.

[Omitting other points.]

Judgment reversed.

BRUCE V. REED.

(104 Penn. St. 408.)

Libel — newspaper — employee.

The proprietor of a newspaper is liable for a libel published therein without his knowledge by the editor in charge.*

LIBEL. The head-note states the point. The plaintiff had judgment below, and appealed.

John Dalzell and S. A. McClung, for plaintiff in error.

A. M. Brown, for defendants in error.

MERCUR, C. J. The defendants are the proprietors of a daily newspaper, called the *Commercial Gazette*, published in the city of Pittsburgh.

This suit is to recover damages for the composing and publishing as editorial in the columns of that paper, an article, reflecting on the plaintiff, which the jury have found to be libellous.

* See *Reg. v. Holbrook*, 4 Q. B. Div. 42; *Barnes v. Campbell* (59 N. H. 128), 47 Am. Rep. 188.

Bruce v. Reed.

The first and second specifications of error are to the rejection of evidence of substantially the same character, offered by the plaintiff.

Whether the evidence was properly rejected depends on the liability of the defendants for the conduct of Dr. Palmer, who was one of the editors of the paper.

A master is liable for the wrongful act of his servant when the injury is committed by authority of the master either expressly conferred or fairly implied from the nature of the employment, and the duties thereby imposed. 1 Bl. Com. 429; Wood Mast. and Serv., § 279. He is liable for the act of his servant within the scope of his employment, and incident to the performance of the duties intrusted to him, although the specific act of injury be in opposition to the express and positive commands of the master. Id., § 307; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326. This may be said to be the settled rule of law applicable to the liability of masters generally for the acts of their agents.

The liability of the proprietors of a newspaper for the act of an agent, to whose management they have intrusted the paper is more broad. The proprietor is presumed to have published the libel which appears therein, and in a criminal prosecution therefor, it is no defense for him to show that it was published without his knowledge and in his absence. *R. v. Walter*, 3 Esp. 21; *King v. Gutch*, 1 Moody & Malkin, 433; Roscoe Crim. Ev. (6th Am. ed.) 621; *Commonwealth v. Morgan*, 107 Mass. 199.

The material for this libel appears to have been drawn from the fact that a reporter of the paper sought to "interview" the plaintiff, and asked his opinion, for publication, on a question of law, which the plaintiff declined to give, and stated reasons therefor.

The offers, *inter alia*, were to prove this conversation, and that it was reported to Dr. Palmer who was in the employ of the defendants, that he had the charge and management of the column in which the article was published, not subject to the supervision of the defendants; that he subsequently wrote, and the defendants published the libel in question; and that Palmer was pecuniarily irresponsible, and is now dead. The defendants objected to the evidence, claiming it to be incompetent, as the plea was "not guilty" and the only question was that of publication. They made no objection to proving the publication of the libellous article, but claimed their liability was restricted to what they actually published. The court rejected both offers.

Bruce v. Reed

If the defendants gave to Palmer such charge and control of an editorial column, reserving no supervision, he was practically authorized by them to write and publish therein any article he thought proper. The very purpose of his employment was to collect information and write articles for publication. If they imposed such duties upon him, and gave him such powers, limited only by his discretion, they are liable for injuries resulting from an act of his, clearly incident to the performance of his duties, in the scope of his employment. He stood in their place. If the libel was written under the authority of his employment and in furtherance of their business, they are responsible whether the wrong resulted from his mere negligence or from a wanton and reckless purpose to accomplish the business in an unlawful manner. *Howe v. Newmarch*, 12 Allen, 49; *Ramsden v. Boston & Albany R. Co.*, 104 Mass. 117; s. c., 6 Am. Rep. 200; *Hawes v. Knowles*, 114 Mass. 518; s. c., 19 Am. Rep. 383; or from his willfulness: *Wood Mast. and Serv.*, 576 and 583. If Palmer were still living he might be sued jointly with them for this libel, or he and they might be sued separately: *Odgers Lib. and Sland.* *157, *294. Every one in any way connected in the publication of a libel is equally responsible for all the damages which flow from that publication. *Id.* *328.

It is true it has been held that express malice in an employee who has written a libel cannot be invoked to swell the damages against the employer, if he was ignorant of the publication and not negligent: *Detroit Post Co. v. McArthur*, 16 Mich. 447; *Scripps v. Reilly*, 38 id. 10; *Robertson v. Wyld*, 2 Moo. & Rob. 101. It was however held in *Goddard v. Grand Trunk Railway Co.*, 57 Me. 202; s. c., 2 Am. Rep. 39, that whenever exemplary damages would be recoverable if the act had been done by the master himself, they are equally recoverable when the act is done by his servant. So in *Wood on Master and Servant*, § 323, it is said, "in many instances it has been held not only that the master is liable for the wanton and malicious acts of his servant in the execution of the authority given him by the master, but also that in all such cases the wantonness and malice may be shown to enhance the damages," citing *Hawes v. Knowles*, *supra*. This conclusion flows logically from the ground on which the liability of the master rests. If he so authorizes the act, that he commits it through the agency of another, he cannot claim exemption from any of the legal consequences flowing from the act.

If this rule of law is applicable to any employer, we are unable to see why it shall not apply to the proprietor of a newspaper, who employs others to write for its columns. The proprietors do not always reside in the city in which the paper is published. They may be in foreign countries much of their time. They direct as to the general course to be pursued; but do not restrict the writers as to the specific means by which the desired end shall be attained. If the proprietors are asked to give the name of the author of any article, they refuse to do so, and a person aggrieved, as a general rule, has no means of ascertaining the name of the writer. If they are not held responsible for what they cause to be written and published, every person connected therewith may escape those punitive damages which the law frequently imposes. As was said in *Barr v. Moore*, 6 Norris, 385, "the liberty of the press should at all times be justly guarded and protected; but so should the reputation of an individual against calumny. The right of each is too valuable to be encroached on by the other."

The defendants are charged with having composed, as well as having published, the libellous article. It follows that evidence was admissible to prove, for the purpose of swelling the damages, the careless, reckless or wanton conduct of the employee in writing the article, in execution of authority given him by the defendants. Under their plea of not guilty, the defendants may prove, in mitigation of damages, the facts and circumstances which induced the writer to erroneously make the charge, provided such facts and circumstances do not tend to prove the truth of the charge made.

It follows, from reasons already given, the learned judge erred in charging substantially as matter of law, that if the defendants had no personal knowledge of the article before it was published, and afterward in good faith did what was reasonable to make amends and reparation, it was not a case for punitive damages. If the facts were found as stated they were for the jury to consider in mitigation of damages; but they should not be considered alone, as controlling such damages. They should be considered in connection with all the other evidence submitted to the jury justly tending to enhance the damages.

We discover no error in the third and fourth assignments to correct. The language of the article did not expressly charge any fraudulent or corrupt conduct or motives. In the declaration the plaintiff put his construction on the meaning of the language used.

Edmundson v. Wragg.

The learned judge charged if the jury found the meaning to be as there averred, it was libellous. The plaintiff has no just cause of complaint with this answer, besides the jury found the language to be libellous. There is no merit in the fifth assignment.

Judgment reversed and a venire facias de novo awarded.

EDMUNDSON V. WRAGG.

(104 Penn. St. 500.)

Statute — construction — Sunday.

Where the last day for the performance of an act by statute falls on Sunday, it may be done on the next day.*

ACTION to recover excess of interest. The opinion states the case.

H. S. Floyd, for plaintiff in error.

E. P. Jones, for defendant in error.

STERRETT, J. The act of May 28, 1858, authorizing the recovery of interest voluntarily paid in excess of six per cent, provides that "no action to recover back any such excess shall be sustained in any court of this Commonwealth unless the same shall have been commenced within six months from and after the time of such payment." This suit was brought on Monday, November 14, 1881, to recover \$529.96, excess of interest, included in payment made on the 13th of May preceding; and the only question presented by the record is whether the suit was commenced within the six months limited by the act. In computing the time, according to the rule recognized in *Cromelien v. Brink*, 5 Casey, 522, the day on which the payment was made must be excluded. In that case the authorities, theretofore not entirely harmonious, were ably reviewed by Mr. Justice PORTER, and the rational rule adopted, that where an act of assembly requires a thing to be done within a certain time from a prior date, and deprives the party of a right for omitting it, the most liberal construction ought to be chosen and the furthest

* See *Cressey v. Parks* (75 Me. 387), 46 Am. Rep. 406.

Edmundson v. Wragg.

time given from which the reckoning is to be made. In other words, the day from or after which the count is to be made should be excluded in computing the time within which the act may be done. In that portion of the opinion which refers to statutes limiting the time within which land sold for taxes, etc., may be redeemed, the principle underlying the decision in that case is explained as follows: "A day is always an indivisible point of time, except where it must be cut up to prevent injustice. In the sense of these statutes, it has neither length nor breadth, but simply position without magnitude. If the time for redemption were fixed at one day after the sale, that day could not be the day of the sale; for it might be made at the last moment of the day, and the owner, being thus prevented from tendering on that day, would lose his right.

The time mentioned must therefore be the following day. So of one year, and of two years." The rule thus settled, in accordance with sound reason as well as authority, has been rigidly adhered to ever since. *Menges v. Frick*, 73 Penn. St. 137; s. c., 13 Am. Rep. 731, and cases there cited.

Applying the rule to the facts of the case stated, the six months expired November 13, 1881, unless that day, being Sunday, is to be regarded a *dies non juridicus*, and therefore excluded in computing the time. The contention of the plaintiff in error is that the limitation began to run on May 14, and would have ended with November 13, 1881, if the latter had been a secular day, but inasmuch as it was Sunday he had the whole of the following day in which to commence his action. In *Goswiller's Appeal*, 3 P. & W. 200, it was held that "whenever by rule of court or act of assembly a given number of days is allowed to do an act, or it is said an act may be done within a given number of days, the day on which the rule is taken or the decision made is excluded, and if one or more Sundays occur within the time, they are counted, unless the last day falls on Sunday, in which case the act may be done on the next day." While the rule, as a whole, has not always been consistently observed, that clause of it which includes the following Monday in the computation, whenever the last day falls on Sunday, has never been departed from. On the contrary, it has been approvingly recognized and applied in several cases, among which are *McKenney v. Reader*, 6 Watts, 34; *Harker v. Addis*, 4 Penn. St. 515, and *Marks v. Russell*, 40 id. 372.

A similar principle of computation is applicable to contracts for

McQueen's Appeal.

sale and delivery of goods. For the purpose of performance Sunday is considered *dies non*, and hence if the last day happens to be Sunday it is to be regarded as stricken from the calendar, though intervening Sundays are to be counted. 2 Benj. Sales, 893, note. Performance of a contract which matures on Sunday may be exacted on the following day. 2 Whart. Cont., § 897. But negotiable paper is an exception to the rule. When it matures on Sunday payment should be demanded on Saturday.

The act of June 20, 1883, passed since the commencement of this suit, is not retroactive in its operation, and therefore it is inapplicable to the case before us; but its provisions are in harmony with the principles upon which we base our judgment, and will doubtless have the much-to-be-desired effect of hereafter setting at rest all questions as to computation of time, in matters within its purview.

Judgment reversed, and judgment is now entered on the case stated in favor of the plaintiff and against the defendant for \$529.96 with costs.

Judgment reversed.

MCQUEEN'S APPEAL.

(104 Penn. St. 596.)

Pledge — creditor's duty as to collaterals.

The plaintiff assigned to the defendant two promissory notes as collateral security. The defendant got judgment on the notes, and sold the maker's real estate of the judgment on execution, without the knowledge of or notice to the plaintiff, for about one-twentieth of its value; the defendant's minor daughter bidding it in at his suggestion, there being no other bidders present. The defendant afterward got judgment against the plaintiff for the balance. In a suit to restrain the collection of that judgment, *held*, that the defendant must be restrained and account for the loss. (*See note, p. 595.*)

BILL to restrain collection of a judgment and for account. The opinion states the case.

John Barton, for appellant.

Fitzsimmons and Robb, for appellee.

McQueen's Appeal.

TRUNKY, J. By the answer it is admitted that the appellant received from the plaintiff two notes, signed by A. D. Dean and David Pentz, for the purpose of collection and application of the same as payment on a debt owed by the plaintiff to the appellant, and that the appellant in his own name obtained judgment on the notes against Pentz for \$344.03; also that the appellant caused an execution to be issued for collection of said judgment, and levied upon the real estate of Pentz which was sold by the sheriff to Eliza M. McQueen for \$51, and she has been in possession of the premises ever since. The master finds that the sheriff's sale took place on December 7, 1877, and that the plaintiff had neither notice nor knowledge of it; that the property was worth from \$800 to \$1,000; that the appellant solicited his minor daughter to make the purchase, and that as between the plaintiff and appellant the sale was fraudulent and prejudicial to the rights of the plaintiff. He also finds that the judgment against Pentz was obtained on May 25, 1877, and that the case of *McQueen v. Oakley*, No. 483, October term 1877, was tried on the 9th and 10th of January, 1879, and judgment recovered for \$342.90.

Although the answer admits that the appellant took the notes as collateral security, it charges that the plaintiff in the said case of *McQueen v. Oakley*, being one of the defendants, swore to a different state of facts, and is therefore estopped from setting up said matter in this action. What facts the plaintiff then testified are not stated in the pleadings a material omission, but as the master has reported them the answer may be treated as amended. On the trial of that suit the issue was whether McQueen had taken the Pentz notes as payment of the debt sued on by him, or as collateral security for the same. The plaintiff here, a defendant then, testified that McQueen had taken them as absolute payment, and McQueen said he took them as collateral security. The verdict established that they were taken as collateral.

In this action the plaintiff again testified that he believed McQueen took the notes as payment and that he told the truth when he testified before. The verdict is not evidence that he committed perjury; it evidences that McQueen lost nothing by reason of the alleged payment. McQueen was not precluded from recovery in that suit by reason of the allegation of payment; had he been, the plaintiff would be estopped from now setting up that matter as a collateral. It is settled that, "a man who obtains or defeats a

McQueen's Appeal.

judgment by pleading or representing an act in one aspect will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject." But the appellant adduces no authority for the position that a man who avers, yet fails to establish, that a particular thing should apply as payment of a debt, shall lose the thing itself when the other party avers he received and used it as a collateral for that debt. When it is certain which of two conflicting witnesses the jury believed, it may be uncertain which told the truth. Now the question is not respecting the plaintiff's credibility, but whether he shall be heard to speak the truth as admitted by the defendant. The master justly ruled against the alleged estoppel.

Where a debtor assigns a judgment as collateral security to his creditor, he parts with his authority over it, and the assignee has the right and power to let the lien die or to keep it alive, and must abide the consequences of his own will or negligence. *Collingwood v. Irwin*, 3 Watts, 306. The debtor is entitled to a credit for a loss upon a judgment assigned as collateral to his creditor, when the loss is occasioned by the supine negligence of the assignee. *Beale v. Bank*, 5 Watts, 529. A bond or chose which is transferred as collateral security is put under the dominion of the creditor to make his claim out of it. His duties in respect to it are active. He is to employ reasonable diligence in collecting the money on the security and applying it to the principal debt, and a conversion of it into a less security is such misuse as makes him accountable to the debtor. *Muirhead v. Kirkpatrick*, 21 Penn. St. 237. A creditor who holds a collateral security for his debt stands in a different relation to the assignor from that of a creditor to the surety for his debtor. By the contract the assignee is invested with the ownership of the collateral for all purposes of dominion over it. When the collateral is lost by the supine negligence of the assignee, he must account for the loss to his own debtor. *Hanna v. Holton*, 78 Penn. St. 334; s. c., 21 Am. Rep. 20. The plaintiff parted with all right of control over the collaterals, and the appellant was bound to employ reasonable diligence in their collection.

From the facts found by the master it follows that Eliza M. McQueen was an innocent purchaser and has a good title for the land. That her father omitted some things which he ought to have done, and suffered the land to be sold for about one-twentieth

McQueen's Appeal.

of its value, was far from reasonable diligence, and was prejudicial to the plaintiff's right, but he may not be guilty of actual fraud. The purchase by the daughter was the same in effect as if it had been by a stranger. Her relationship to the holder of the collateral must be considered in connection with his omission to give the plaintiff notice of the sale and the absence of effort on his part to effect a sale at a fair price. We cannot adopt the inference that the appellant fraudulently procured the sale. He had reason to believe that the property was worth nearly three times the amount of the judgment, and when informed that the sale was adjourned for want of bidders it was not enough to get his infant daughter to buy it for a nominal sum through the agency of his own attorney. He had absolute control of the writ and if he did not choose to stay it till a better time for selling, he ought at least to have notified the assignor before making a sacrifice of the property which left the judgment worthless. His conduct, if not fraudulent, was so culpably negligent that he must account for the loss to the plaintiff.

[Omitting minor matters.]

Although the decree must be modified, the conclusion of the master and court below is affirmed as to the appellant's liability to account for the loss. We are of opinion that the loss is measured by the amount of the collateral, not the value of the land sold at sheriff's sale.

NOTE BY THE REPORTER.—The creditor is bound to diligence and good faith in realizing on collaterals, and liable for loss by want thereof. *Alexander v. Alexander*, 64 Ind. 541; *Briggs v. Parsons*, 89 Mich. 400; *Colquitt v. Stultz*, 65 Ga. 305; *Wills v. Wills*, 53 Vt. 1; *Butterton v. Roope*, 8 Lea, 215; s. c., 31 Am. Rep. 633; *Whitin v. Paul*, 13 R. I. 40; *Lamberton v. Winslow*, 13 Minn. 233.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MAINE.

KING v. YOUNG.

(76 Me. 76.)

Water and water-courses — mussel-bed.

A mussel-bed, between which and the shore no water flows at low tide, belongs to the owner of the adjacent shore.

TRESPASS. The opinion states the point. The plaintiff had judgment below.

A. P. Wiswell, for plaintiff.

Hale and Emery, for defendant.

WALTON, J. This is an action of trespass *quare clausum fregit*. The contention is in relation to the ownership of a mussel-bed in Jordan's river in the town of Lamoine; and the case is before the law court on exceptions.

[Omitting minor points.]

As already stated the contention was in relation to the title of a mussel-bed which had formed in Jordan's river in front of the

King v. Young.

plaintiff's land and which by its growth had finally reached and become attached to the shore. Upon this point the presiding judge instructed the jury that if by natural causes the bed of the river commenced and continued to be raised or the water commenced and continued to recede, so that by these natural causes there was an accretion of soil that came above the surface of the water at ordinary low water, and continued to increase until the accretion connected with the plaintiff's shore, so that there ceased to be any channel or sheet of water between such accretion and the shore at ordinary low water, then the accretion would belong to the plaintiff, notwithstanding the highest portion of it was first raised above the surface of the water some distance from the shore, and the judge added that by natural causes he meant the action of the water in washing up gravel, sand or soil, or the action of the mussel.

We think this ruling was correct. It seems to be settled both in England and in this country that the land of a riparian proprietor may be increased by accretion. This is not denied by the defendant's counsel. But he contends that the increase must be gradual, and from the shore outward; that if an island forms at a distance from the shore and then by its own growth extends inward till it reaches the shore, such new made land will not become the property of the owner of the shore; and in this we think he is correct. He then contends that a mussel-bed is an island, if it first commences to form at a distance from the shore, and there first shows itself above the surface of the water at ebb tide, leaving sufficient water between it and the shore for boats to pass, although by its continued growth it subsequently extends to and connects with the shore so as to leave no water between it and the shore at ebb tide. In this we think he is wrong. We think a mussel-bed over which the water flows at every tide cannot properly be called an island. We think such formations constitute what are called flats; and by virtue of the ordinance of 1641-7 belong to the owner of the adjoining land, if within a hundred rods of high-water mark and so connected with the shore that no water flows between them and the shore when the tide is out; and it was settled in *Moore v. Griffin*, 22 Me. 350, that the owner of the adjoining land can maintain trespass *quare clausum fregit* against one who enters upon the flats and takes and carries away mussel-bed manure; that neither the ordinance of 1641-7, nor the common law authorizes the taking of

Smith v. Jones.

mussel-bed manure from the flats of another person between high and low-water mark on tide waters.

Exceptions overruled. Judgment on the verdict.

PETERS, C. J., DANFORTH, VIRGIN and SYMONDS, JJ., concurred.

SMITH v. JONES.

(76 Me. 128.)

Arrest — of privileged witness.

No action lies for the arrest on civil process of a witness returning home from court and privileged from arrest.

THE opinion states the case. The plaintiff had judgment below.

Barker, Vose & Barker, for plaintiff.

J. Hutchings, for defendant.

PETERS, C. J. The plaintiff sues the defendant for causing his arrest upon a civil process in defendant's name, in the province of New Brunswick, while the plaintiff was returning from a court in the Province, at which he had been in attendance as a witness, to his home in Maine. The defendant knew that the plaintiff was a returning witness at the time. Our view of the law is that the action cannot be maintained.

The question is satisfactorily solved by an examination of the nature and extent of the privilege from arrest, which the law accords to witnesses.

It is not a natural right. It is contrary to common right. The plaintiff was arrested in pursuance of a general right, in a manner precisely as any other debtor could have been. The claim was suable. The court had jurisdiction. The *capias* was legally issued. He stood upon the footing of all debtors.

The plaintiff's privilege was not an absolute right: It was not an absolute right of freedom from arrest, such as belongs to members of the royal family of England, or to ambassadors and some others; not the case of total exemption from arrest, such as the

Smith v. Jones.

law extends to persons discharged from arrest by bankruptcy or insolvency proceedings; or where the law forbids arrest for the collection of demands. The right is afforded by the law not so much for witnesses as for parties to suits. Some cases assert that it is a privilege of the court and not of the witness. Other cases incline to the idea that it is a privilege of parties rather than of courts. But that is a distinction without difference. The idea is the same. Courts exist for the benefit of parties. It is a policy of the law established for the facilitation of the public business. It is a protection thrown about a witness more for the sake of others than himself. It is clear that a person ordering an arrest of a witness may be punished for contempt of court for interference with its business.

It is, at most, a conditional or contingent right of the witness. He may take it or not as he pleases. All the authorities affirm that the privilege may be waived. Therefore the arrest cannot be void; is only voidable. The arrest remains valid until avoided. And the witness can avoid the arrest only by applying to the court for a discharge. He waives the privilege unless he applies for a discharge.

The plaintiff complains that a refusal to uphold his action refuses him a remedy. That is not so. We have just intimated what the proper remedy is. It is an application for a discharge from the arrest. He may be discharged by a judge upon summary motion. He may sue out a *habeas corpus*. He may procure his writ of protection in advance of starting for or from court, if circumstances make it reasonable to ask the mediation of court for the purpose. The law does not declare that a witness shall not be arrested, but gives to him the right to free himself from arrest, if he desires to, and points out several ways by which it may be accomplished. It is not a right so much to avoid being arrested, but is a right to terminate the arrest. It is said however that a person may be under such pressure of imprisonment as to be powerless to obtain the action of a court or judge before suffering actual incarceration. This would not often happen. A writ of protection would ordinarily prevent the dilemma. An officer might be liable for an abuse of authority, if he exceeds his duty and acts roughly and oppressively. And of course an action would lie against the creditor who proceeds maliciously and without probable cause.

How can a creditor know that his debtor, who is a witness, will

insist upon the privilege, until the debtor asserts it? And how can he know that the court will grant a discharge if asked for? It is to some extent a discretionary matter with a court or judge, whether a witness shall be discharged upon arrest. How can this discretion be anticipated by a creditor? And why should the creditor be required at his peril to correctly settle the question whether the debtor is at court in good faith or not, or whether he has overstayed his privilege, or whether unnecessarily loitering on the way, judicial questions that can be easily and summarily settled by a judge in or out of court without much expense to parties. It is not at all unreasonable to cast upon the court, and to relieve parties from the responsibility of such questions.

The precise question here presented has not received very much attention from courts, and there is an almost total absence of judicial expression in favor of the plaintiff's position where the privilege is at common law and not by statute. The remedy by action was established long ago in New York by statutory enactment, which is an implication that the remedy did not exist there at common law. And this accounts for intimations in cases in that State that damages for a breach of the privilege are recoverable. *Paine and D. Prac. Arrest. Snelling v. Watrous*, 2 Paige, 214; *Salhinger v. Adler*, 2 Robt. 704. Some English statutes give a right of action in some cases, or establish other special remedy, for a violation of the privilege of freedom from arrest; from which an implication arises that no such remedy exists at the common law in that country. Tidd's Practice lays down the various remedies that are available for a violation of the privilege from arrest belonging to witnesses and all other persons or parties in necessary attendance upon courts, and omits all mention of a right of action for damages. Text writers generally are silent upon the question. In 2 Add. Torts (4th Eng. ed.), 796, it is said however that "the privilege does not form the ground of any action at law." And in Cooley Const. Lim. (5th ed.) 162 (*135), it is said, in note: "The arrest is only voidable; and in general the party will waive the privilege unless he applies for discharge by motion or on *habeas corpus*."

Not many decided cases touch the point. The early experimental actions were against officers, and all of them failed. But much of the reasoning of the courts really went against any action, disregarding any distinction between officer and party. The early cases are cited and commented upon in *Carle v. Delesdernier*, 13 Me. 363.

Strout v. Packard.

See *Chase v. Fish*, 16 id. 132. Some phases of the question are touched in later cases. *Wilmarth v. Burt*, 7 Metc. 257; *Aldrich v. Aldrich*, 8 id. 102; *Thompson's case*, 122 Mass. 428; s. c., 23 Am. Rep. 370; *Person v. Grier*, 66 N. Y. 124; s. c., 23 Am. Rep. 35. Several English cases take strong ground against the maintenance of such an action. In *Yearsley v. Heane*, 14 M. & W. 322, it is said: "The protection is limited to the fact of the individual so arrested being entitled to be discharged." In the same case it was said by POLLOCK, C. B., "did the legislature mean to give more than this, that if the party was arrested he might be discharged, whereby he has the full benefit of the protection? I think not." *Ewart v. Jones*, 14 M. & W. 774; *Stokes v. White*, 1 Crom. M. & R. 223; *Rideal v. Fort*, 11 Ex. 847; *Magnay v. Burt*, 5 Ad. & El. 381. In a note to *Stokes v. White*, *supra*, in the edition by Hare and Wallace, careful annotators, it is said, upon the authority of the cases determined in the Court of Exchequer Chamber, that "an arrest by the sheriff, under a writ from any of the queens' courts, of a person privileged from arrest by reason of attendance as a witness under the process of another court, does not form the ground of any action at law for damages, but is only the subject of an application to the court, under whose authority the party had been compelled to appear as a witness; the privilege being, not that of the person, but that of the court, and therefore of discretionary allowance."

Exceptions sustained.

WALTON, BARROWS, DANFORTH and LIBBEY, JJ., concurred.

STROUT V. PACKARD.

(76 Me. 143.)

Evidence—joint assault—conspiracy.

In an action against several for a joint assault, evidence of prior and subsequent misconduct on the part of some of the defendants, tending to show a conspiracy, implicates only those committing such acts.

ACTION for joint assault. The opinion states the case. Verdict against all the defendants.

VOL. XLIX—76

Strout v. Packard.

A. A. Strout, H. B. Cleaves, and Strout, Gage & Strout, for plaintiff.

Charles F. Libby, for respondents.

SYMONDS, J. This was an action against seven defendants, charging them with a joint assault upon the plaintiff, and claiming to recover damages therefor. The act of assault was the throwing of a piece of coal which struck the plaintiff over the eye and injured him seriously. It was of course the act of one person. To show a concert of action on the part of the defendants, such as to affect them with a joint liability for this act of one, evidence was received of the misconduct of some of the defendants at other times, which plaintiff claimed tended to prove a general design on their part, as upper classmen in Bowdoin College to harass the members of the freshman class of whom the plaintiff was one.

The court said to the jury: "Evidence was offered which you will remember, as to the acts of some of these defendants in other cases at other times. It is necessary that you should understand precisely what that evidence was offered for and what use you can properly make of it. It was offered and admitted simply to establish, so far as it might in your minds tend to establish, what the common design of the defendants was upon that night. Evidence was offered to show what some of the defendants and the parties with whom they were out on other evenings shortly before did at the rooms of other freshmen. Now this evidence was admitted only, because as to those of the defendants who did not actually throw the coal, the proper decision of the question may require evidence of the intention and purpose for which the seven defendants were out together that night, and what kind of acts and invasions of the freshmen in their rooms were to be expected when parties were out upon such an expedition, and so to indicate what kind of a concert of action subsisted between the defendants on the night when the plaintiff was hurt."

The defendants seasonably requested the instruction, "that evidence of such (prior or subsequent) misconduct on the part of any of these defendants is not evidence against the other defendants not participating in the acts." This request was refused by the court and the limitation which it contained was not included in any of the instructions given to the jury in the charge.

Strout v. Packard.

The declaration alleged a joint assault. The averment of a conspiracy was of no account except that under it it might be proved in any legal way that the hand which threw the coal carried into execution the purpose of the seven. Evidence of prior or subsequent misconduct on the part of some of the defendants was only admissible for the purpose of proving as among them the existence and character of the combination or conspiracy alleged. The fact that a conspiracy exists or the extent to which it goes, is not to be proved as against A., by the declarations or the acts of B., with which no connection on the part of A. is shown, and which do not appear to have been made or done in furtherance of a common design entertained by both. That a joint purpose of the seven was carried into effect by throwing the coal in this instance, was not to be proved by showing previous acts of combination and torts committed in pursuance thereof by three or four only. Precisely the limitation which the request contained was required in the legal statement of the case; that the testimony to misconduct on the part of some of the defendants before and after this assault tending to show a combination among them, and offered and received only as "evidence of the intention and purpose for which the seven defendants were out together that night, and what kind of acts and invasions of the freshmen in their rooms were to be expected when parties were out on such an expedition, and so to indicate what kind of a concert of action subsisted between the defendants on the night when the plaintiff was hurt," should have been limited in its application to those defendants against whom such acts of prior or subsequent misconduct were proved.

The evidence was offered only for the purpose of proving the presence and the scope of a joint intent in the single act whether there was on this occasion a common purpose among the several defendants and whether it extended to the throwing of such a missile under such circumstances. The previous act of one was not evidence to prove this against another who did not participate in that act. The mind of one is not to be revealed by the act of another, till some relation between the two is shown in the doing of that act.

In the introduction of evidence, the court was careful to limit the effect of the admissions said to have been made after the fact, to the president of the college by several of the defendants, so that they should be regarded by the jury in each instance as evidence

only against those by whom the admissions were made. "The witness will recollect that the statements are evidence only against those who made the statement; not against others. He must be careful as to his recollection of the particular persons who made the statements." This was correct (*Comm. v. Ingraham*, 7 Gray, 46), and we think it is as true of an earlier or later act of one of the defendants, when offered to show the existence of a combination or common intent as it is of such an admission by one. That a joint purpose of the seven took effect in this single act of assault by one could not be proved against all by showing acts of alleged combination among some of them at other times, not participated in by the others. Such an act as against those not participating in it did not tend to prove that they had any common purpose with the others whatever either when the act was committed, or on the night of this assault.

The distinction is clear between the rule of evidence which applies here, and the rule which, when a conspiracy has once been proved *aliunde*, while it continues, receives the declarations and acts of one conspirator in furtherance of the common design, as evidence against even his absent associates. The jury were directed at the trial that the testimony under consideration was received for the purpose of proving what legally must be otherwise proved, before the evidence becomes admissible under this later rule, namely, the existence of the common design and its presence in a particular transaction. A conspiracy being proved among a certain number of men, the act of one in pursuance of the common plan may be the act of all. But a man is not to be proved to be a conspirator, having a joint illegal intent with others in a particular assault which he does not personally commit, by showing the misconduct of the others on previous occasions in which he does not participate. How far the evidence of misconduct at other times, as disclosed in the report, may tend to show a combination on the part of any of the defendants to do such a wrong as that of which the plaintiff complains, need not here be considered; but there can be no doubt that such evidence, received to prove a common plan or purpose within the scope of which the committing of such an assault as this was included, must legally be confined to its effect to disclose the existence of such plan on the part of those against whom the acts are proved.

"Where two or more persons are associated for the same illegal

purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence." *Am. Fur Co. v. United States*, 2 Pet. 365; *Nudd v. Burrows*, 91 U. S. 438. In the present case the question was whether the defendants were associated, for an illegal purpose, on the night of the injury to the plaintiff, and on that issue evidence of the misconduct of some of them at other times was received as generally admissible against all, while a request to limit the effect of it was refused. Each defendant had the right to claim that his joint liability for an assault should not be established, in whole or in part, by the acts of others, with which he was in no way connected. It is to be observed, as the court ruled at the trial, that "the gist of the action is not the conspiracy, but the damage done to the plaintiff by an act which is alleged to have been done by the defendants. The averment that the act done was in pursuance of the conspiracy does not change the nature of the action. It is still an action of trespass for an assault and battery alleged to have been jointly committed by the defendants upon the person of the plaintiff; and it is to be tried and determined upon the principles applicable to actions of that description." The material inquiry therefore as to each one of the defendants was whether he shared in the commission of this particular assault, or not.

The existence of a conspiracy, as we understand it, is not in the first instance to be proved against one by the mere act or declaration of another, but beyond that, if the existence of the conspiracy were fully proved as to some of the defendants, that fact had no tendency to decide adversely to the other defendants the vital question whether they took part in that conspiracy, and in such a way, to such an extent, as to make them joint trespassers in this transaction.

"The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestæ*, and therefore the act of all. It is the same principle of identity with each other that governs in regard to the acts and admissions of agents, when offered in evidence against their principals, and of partners, as against the partnership." 3 Greenl. Ev.. § 94.

“It is of course understood, that to entitle the declarations of a co-conspirator to admission, the conspiracy must first be proved *aliunde*. 2 Whart. Ev., § 1206.

Now in the present instance the evidence of misconduct by some of the defendants at other times was not received to be connected with other evidence, showing that such misconduct at those times was in pursuance of a common plan in which all were involved — which plan extended to and included the commission of the principal tort — but was expressly received as in itself substantive evidence of the existence of the common plan among all the defendants; “to establish, so far as it might in your minds tend to establish, what the common design of the defendants was upon that night;” * * * as “evidence of the intention and purpose for which the ~~seven~~ defendants were out together that night, * * * and so to indicate what kind of a concert of action subsisted between the defendants on the night when the plaintiff was hurt.”

We can find no authority, and we can see no reason, for allowing the jury to regard the disconnected act of one of the defendants at another time and place as evidence pertinent to the issue, whether another defendant was guilty of a joint trespass on the night in question. This was the effect of the rulings given, accompanied with the refusal to give the instruction requested.

Notwithstanding the great learning of the charge given to the jury in this case, we think there was a defect in it in this respect which tended to the prejudice of the legal rights of the defendants, and may have been decisive of some of the important issues of the trial.

Exceptions sustained.

PETERS, C. J., WALTON, VIRGIN and LIBBEY, JJ., concurred.

SANDERS v. GETCHELL.

(76 Me. 158.)

Election — voters — residence — student.

Although the Constitution provides that the residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary is situated, yet he may gain the right to vote there if he intends to make that place his permanent abode, independent of his sojourn as a student.

Sanders v. Getchell.

ACTION against selectmen of Waterville, for refusing to put plaintiff's name on list of voters. The opinion states the point.

Baker, Baker & Cornish, and F. A. Waldron, for plaintiff.

Edmund F. Webb and Appleton Webb, for defendant.

PETERS, C. J. [Omitting another point.] Another question is to be considered, and that is, under what circumstances does a student at a seminary of learning acquire a voting residence in the place where such seminary is situated?

The constitutional interdiction is in these terms: "The residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary is situate." It is clear enough that residing in a place merely as a student does not confer the franchise. Still a student may obtain a voting residence, if other conditions exist sufficient to create it. Bodily presence in a place, coupled with an intention to make such place a home, will establish a domicile or residence. But the intention to remain only so long as a student, or only because a student, is not sufficient. The intention must be, not to make the place a home temporarily, not a mere student's home, a home while a student, but to make an actual, real, permanent home there; such a real and permanent home there as he might have elsewhere. The intention must not be conditioned upon or limited to the duration of the academical course. To constitute a permanent residence, the intention must be to remain for an indefinite period, regardless of the length of time the student expects to remain at the college. He gets no residence because a student, but being a student does not prevent his getting a residence otherwise.

The presumption is against a student's right to vote, if he comes to college from out of town. Calling it his residence does not make it so. He may have no right to so regard it. Believing the place to be his home is not enough. There may be no foundation for the belief. Swearing that it is his home must not be regarded as sufficient, if the facts are adverse to it. Deception or misconstruction should not be encouraged. The constitutional provision should be respected.

Each case must depend largely upon its peculiar facts. The question is not always of easy solution. One difficulty is this, that all the visible facts may be apparently consistent with either theory

— that of a temporary or a permanent home. The Massachusetts court, in a discussion of the question (5 Metc. 589), presents such descriptions of fact as might be of a controlling weight upon the two sides of the question, very clearly, in the following remarks: “If the student has a father living; if he still remains a member of his father’s family; if he returns to pass his vacations; if he is maintained and supported by his father; these are strong circumstances repelling the presumption of a change of domicile. So if he have no father living; if he have a dwelling-house of his own, or real estate of which he retains the occupation; if he have a mother or other connections, with whom he has been before accustomed to reside, and to whose family he returns in vacations; if he describes himself of such place, and otherwise manifests his intent to continue his domicile there; these are all circumstances to prove that his domicile is not changed.

“But if having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent; or if having no parent, or being separated from his father’s family, not being maintained or supported by him; or if he has a family of his own, and removes with them to such town; or by purchase or lease takes up his permanent abode there, without intending to return to his former domicile; if he depend on his own property, income or industry for support; these are circumstances, more or less conclusive, to show a change of domicile, and the acquisition of a domicile in the town where the college is situated.” The cases generally are of the same tenor. *Vanderpoel v. O’Hanlon*, 53 Iowa, 246; s. c., 36 Am. Rep. 216; *Fry’s Election* case, 71 Penn. St. 302; s. c., 10 Am. Rep. 698.

The facts of the case are quite beyond dispute. They were urgently presented to the defendants. There was no reason to deny or disbelieve them.

The plaintiff was thirty-two years old; left his father’s home in Patten, in this State, when nineteen; never afterward received parental support or was under parental control; visited home afterward, only occasionally and briefly; his father’s home was, soon after his leaving, changed from Patten to other places; at the age of nineteen he was in business for himself in Foxboro, Massachusetts; after coming of age he was taxed and voted for several years in that place; in 1875, at the age of twenty-four, he entered a

Stevens v. King.

classical school at Waterville, and in 1878 entered college there, graduating in 1882; in 1879 he formed the purpose of making Waterville his home for an indefinite period of time, and was taxed and voted there from that date until 1882, when against his protest his name was by the defendants omitted from the lists; he has ever since claimed and regarded Waterville as his home, a friend's house being open to him when there, though possessing no property there of consequence, and entering a theological institution in Newton, Massachusetts, in 1882, where he has since remained as a student.

We think a man in such a situation should have had in 1882 the privilege and ability of possessing a domicile somewhere, and it could not easily be in any place unless in Waterville. To deprive him of his right to vote under such circumstances was not reasonable. That the town officers acted honestly we are not inclined to doubt. That they committed a mistake — at least an unintentional wrong — we feel convinced.

We do not however, concur with the plaintiff that the damages should be either exemplary or severe. We think the wisest and most just conclusion, in view of all the circumstances, will be to accord to the plaintiff no greater damages than sufficient to carry the costs. In *Lincon v. Hapgood*, 11 Mass. 350, it is said: "The court would determine that a sum, comparatively not large, would be excessive damages in a case, where no fault but ignorance or mistake, was imputable to the selectmen."

Judgment for plaintiff for \$25 damages.

BARROWS, DANFORTH, VIRGIN and SYMONDS, JJ., concurred; LIBBEY, J., did not sit, having been of counsel.

STEVENS V. KING.

(76 Me. 197.)

Boundary — on pond.

A boundary "by the shore" of a pond conveys to low-water mark.*

ACTION for flowage. The opinion states the case.

* See *Warren v. Thomaston* (75 Me. 329), 46 Am. Rep. 397, ante, 311.

J. H. Potter, for plaintiff.

Bean and Beane, for defendants.

WALTON, J. This is a complaint for flowage, and the first question is whether the plaintiff's deed bounds him on Wilson pond at high or low-water mark. We think it bounds him at low-water mark.

Lands bounded upon rivers above the ebb and flow of the tide generally extend to the middle of the stream. But lands bounded on fresh-water lakes and ponds extend only to low-water mark.

Of course they may be bounded at high-water mark. But in the absence of a clearly expressed intention to the contrary, the presumption is that they extend to low-water mark. Such is the settled law of this State.

In *Bradley v. Rice*, 13 Me. 198; 29 Am. Dec. 501, the court held that lands bounded on a pond extend only to the margin of the pond, and not to the center of it. But the question was not raised or considered whether the boundary would be at high or low-water mark.

But in *Wood v. Kelley*, 30 Me. 47, this question was considered, and the court held that lands bounded on a fresh-water pond extend to low-water mark.

The language of the plaintiff's deed, after describing the point of beginning, is as follows:

"Thence easterly on said line to Wilson pond; thence northerly by the shore of said pond to Hiram Norris' land."

The defendants contend that when, as in this deed, land is bounded by the shore of a pond, it extends only to high-water mark.

The answer to this argument is that such is not the necessary result. The shore of a pond being the space between high and low water, necessarily has two sides, a high-water side and a low-water side; and land bounded by the shore may be bounded by the high-water side or the low-water side. If the side lines of a parcel of land, starting back from the pond, run to the shore and there stop, and the line between these two points runs along the shore, of course the land will be bounded by the high-water side of it. But if the side lines are described as running to the pond, the result will be otherwise. The legal force and effect of such a de-

Crocker v. McGregor.

scription are to carry the land to the pond at all stages of the water, which is equivalent to saying that it extends to low-water mark; and if the line between these two points is run along the shore, it must be along the low-water side of it; and the land will be bounded at low-water mark.

And such is the effect of the description in the plaintiff's deed.

The first line is described as starting at a point back from Wilson pond and thence running to the pond. The terminus of the line is not the shore, it is the pond itself; and the legal effect is to carry the line to the low-water side of the shore; and as the next course starts from that point and runs along the shore, it necessarily runs along the low-water side of it; and the land is bounded at low-water mark.

[Omitting minor points.]

The result is that under the agreement of the parties stated in the report a nonsuit must be entered.

Plaintiff nonsuit.

PETERS, C. J., DANFORTH, LIBBEY and EMERY, JJ., concurred.

CROCKER V. MCGREGOR.

(76 Me. 282.)

Evidence — nuisance — fright of horses.

In an action for a personal injury by the fright of a horse by the escape of steam from the defendant's mill, situated on the edge of a highway, evidence that other safe horses had been frightened by it is admissible. (*See note, p. 618.*)

ACTION for personal injury by nuisance. The opinion states the case. The plaintiff had judgment below.

John Varney, for plaintiffs.

Charles P. Stetson, for defendant.

LIBBEY, J. This action comes before this court on exceptions and motion. It is for an injury to the female plaintiff alleged to have been caused by the fright of her horse by steam escaping

from the defendant's mill, situated on the margin of the public highway, which the plaintiff alleges was a public nuisance to the travel over the way.

The exception is to the admission of evidence produced by the plaintiff. Witnesses for the plaintiff were permitted to testify, that when travelling by the mill with horses well broken and ordinarily safe, their horses were frightened by the escaping steam. This evidence was limited to a short time before and after the plaintiff's injury, when the mill was in the same condition as when she was injured; and was admitted for the sole purpose of showing the capacity of the escaping steam to frighten ordinary horses. We think it was properly admitted.

The issue was whether the mill, as constructed and used with the steam escaping into the way, was a nuisance to the public travel. Evidence showing that it naturally frightened ordinary horses when being driven by it was competent to show its effect upon the public travel, its character and its capacity to do mischief. Its effect on horses was not dependent upon the acts of men which may be the result of incapacity or negligence, but was caused by action of the inanimate thing upon an animal acting from instinct. It was not to show that other parties were injured at the same place by the same cause, and is therefore distinguishable from cases against towns for injury from defects in a highway in which this court has held that evidence of accidents to others at the same place is inadmissible, because it raised too many collateral issues. Here the only issue is the effect of the sight and sound of the steam upon ordinary horses, as tending to show that travel over the way was thereby rendered dangerous. *Hill v. P. & R. Railroad Co.*, 55 Me. 439; *Burbank v. Bethel Steam Mill Co.*, 75 id. 373; s. c., 46 Am. Rep. 400. We think the competency of the evidence rests upon the same principle as evidence in actions against railroad corporations for damage by fire, alleged to have been set by coals or sparks from a passing locomotive, that the same locomotive, or others similarly constructed and used, have emitted sparks and coals, and set fire at other places and on other occasions. It tends to show the capacity of the inanimate thing to do the mischief complained of. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Whitney v. Inhabitants of Leominster*, 136 Mass. 25.

We have carefully examined the evidence reported upon which the motion to set aside the verdict is based; and while we think

Crocker v. McGregor.

the verdict might properly have been for the defendant, still there is sufficient in favor of the plaintiff, if the jury believe it, to authorize the verdict for her. We cannot say that the verdict is so clearly wrong as to require the court to set it aside.

Exceptions and motion overruled.

PETERS, C. J., WALTON, DANFORTH and VIRGIN, JJ., concurred.

NOTE BY THE REPORTER.—In connection with this case read *Lewis v. Eastern Railroad*, 60 N. H. 187, holding that on the question whether a locomotive engine emitting steam and standing near a highway crossing is an object dangerous to the public travel, as likely to frighten horses of ordinary gentleness, evidence of other horses than the plaintiff's being frightened by locomotives and cars passing near the same crossing is not admissible. The court said: "Evidence that other horses driven by other persons at other times had been frightened by the same or a similar object, or by a sound produced in the same or a similar manner, was admissible to show that the object or sound was dangerous to the public travel, as being more likely than otherwise to produce the result complained of. *Darling v. Westmoreland*, 52 N. H. 401; *Gordon v. B. & M. Railroad*, 58 id. 396. The case does not show that the evidence excepted to was that of other horses being frightened by the escape of steam from a locomotive, but by locomotives and cars passing upon the railroad near the place of the injury. In *Darling v. Westmoreland*, the plaintiff was permitted to show that other horses were frightened at the same pile of lumber which produced the particular fright occasioning the injury. In *Gordon v. Railroad*, evidence that other horses were frightened by the same or a like use of a locomotive as that which caused the injury, was admitted; and in *Rowell v. Railroad*, *supra*, evidence that locomotives scattered sparks and coals was decided to be competent and relevant on the question whether the particular fire was set by sparks or coals from a locomotive. In *State v. M. & L. Railroad*, 52 N. H. 528, neglect of the engineer to give the warning whistle on approaching a highway crossing was made evidence on the question of the particular negligence at a different time, alleged as the cause of the injury; and in *Hall v. Brown*, 58 N. H. 93, the usage of railroad agents and servants in managing cars standing on or near a crossing was admitted to show the probable management of the same cars at the same place at the time in question. The evidence excepted to was not evidence of other horses being frightened at the sound of escaping steam, nor at the sight of the vapor produced by it. Evidence of fright produced in horses by the sight or sound of a locomotive and cars passing on a railroad, could not be evidence on the question of whether or not the plaintiff's horse at another time was frightened at the sound of steam escaping from a locomotive stationary on the track. Nor could the defendant's negligence in managing a locomotive and cars running on the railroad at or near the crossing be evidence of negligence or mismanagement in respect to steam escaping from a locomotive not moving. The facts shown by the excepted evidence

Crocker v. McGregor.

were too unlike those alleged in the declaration to be evidence of negligence in the particular case."

In *Whitney v. Inhabitants of Loominster*, cited in the principal case, an action for injuries caused by a defect in the highway, the defense was want of due care in the plaintiff in driving at too great speed, on which there was conflicting testimony. Defendant was allowed to show that the horse had trotted a mile in three minutes. *Held*, that the evidence was competent, as tending to show the horse's capacity for speed, and the reasonableness of the defendant's theory that the horse had [in fact been driven on other occasions at the rate of a mile in three minutes; especially after the plaintiff had himself admitted the fact upon cross-examination. The court said: "The fact to be determined was undoubtedly the rate of speed at which the horse was driven at the time of the accident, but when the testimony showed a very high rate of speed, as bearing upon its reasonableness and probability, it was competent to show that he had a great capacity for speed, even if it might also be true that he was not then driven at his full speed. It would have been competent for the plaintiff to have shown in answer to defendant's testimony that the horse was incapable of such a rate as fifteen miles an hour, and that he could not be driven or urged more than five miles an hour. The evidence offered and received here was of the same description, even if less conclusive. Where the evidence is conflicting as to whether an accident has occurred entirely by reason of a defect in the way for which the defendant is responsible or by the reason of the fact that the vicious character and conduct of the horse which the plaintiff was driving has contributed thereto, evidence of the character and habits of the horse is admissible. Although the accident may have occurred even if the horse were vicious solely by the defect in the way, yet evidence of the existence of a vice in the horse legitimately bears upon the inquiry as to the cause of the accident and is not irrelevant. *Todd v. Rowley*, 8 Allen, 51; *Maggi v. Cutts*, 128 Mass. 535. While in *Tuttle v. Lawrence*, 119 id. 276, the rejection of evidence of the capacity of the horse for speed which the plaintiff was driving, when offered by defendant to contradict statements elicited by him in cross-examination, and not appearing to have had any necessary bearing upon the rate of the speed the horse was travelling at the time of the accident, was held not to furnish just ground of exception, it was so for the reason that it was deemed to be within the discretion of the presiding judge to limit the inquiry as to the speed which the horse was capable of going. It by no means follows from this decision that had the evidence thus offered been received its admission would have furnished ground of exception. We have preferred to discuss this question although there is another reason arising from the position of the case which is quite decisive against the excepting party. The plaintiff himself had testified against his objection, but without exception on his part that the horse could trot a mile in three minutes. The evidence offered by defendant was only confirmatory of this. If it was otherwise incompetent, it simply tended to prove a fact which the plaintiff himself conceded and cannot have been prejudicial to him."

See *Parker v. Portland Pub. Co.*, 69 Me. 178; s. c., 31 Am. Rep. 262; *Hudson v. Chicago, etc., R. Co.*, 59 Iowa, 581; s. c., 44 Am. Rep. 692.

Northrop v. Hale.

NORTHROP v. HALE.

(76 Me. 303.)

Evidence — pedigree — declarations.

To prove the illegitimacy of a claimant of an intestate estate, the declarations of the intestate's deceased sister, in whose family the claimant was born and brought up and the intestate lived, are admissible, when made *ante litem motam*.*

A PPEAL from judge of Probate. The opinion states the case.

Nathan and Henry B. Cleaves and M. P. Frank, for plaintiff.

Drummond & Drummond and Clarence Hale, for defendant.

VIRGIN, J. This appeal is an appeal from a decree of the judge of Probate, wherein he ordered a distribution of an intestate estate, and adjudged against the claim of the appellant that he was not the natural son of the intestate, but was the legitimate son of the intestate's sister.

In the Supreme Court of Probate to which the appeal was taken, the same question was submitted to a jury who found against the appellant.

At the trial of the issue it appeared *inter alia* that the appellant was born in Steubenville, Ohio, and was brought up there in the family of the intestate's sister, in which also the intestate resided at the time of the appellant's birth and for several years thereafter. The appellant tendered the "declaration of Mary Northrop (the intestate's sister) relative to the birth and parentage of John A. Northrop," the appellant. What the specific declarations were, the bill of exception fails to disclose. It is sufficiently general to include declarations that the appellant was the lawful son of the declarant, which was claimed by the appellee. The admissibility of such a declaration could not be successfully challenged under any known rule of evidence. For the practice in such cases seems to be that some evidence of the requisite relationship (though the exact degree may not be essential perhaps, *Vowles v. Young*, 13 Ves. 140) *dehors* the declarations must be shown before they can

* See *Swink v. French* (11 Lea, 78), 47 Am. Rep. 277.

be admitted. *Futter v. Randall*, 2 Moore & P. 24; *Plant v. Taylor*, 7 Hurl. & Nor. 237; *Gee v. Ward*, 7 E. & B. 514. And this evidence is primarily addressed to the presiding justice, who, before admitting the declarations, must be satisfied that a *prima facie* case of the requisite relationship has been made out. *Jenkins v. Davis*, 10 Q. B. 313, 322; *Hitchins v. Eardley*, L. R., 2 P. & D. 248. And the facts shown, the birth, place of birth, the bringing up and the name of the appellant, are ample *prima facie* evidence of relationship to warrant the admission of the declaration mentioned. 4 Camp. 416; *Viall v. Smith*, 6 R. I. 417. Still there is some apparent discrepancy in the practice. *Blackburn v. Crawford*, 3 Wall. 175; *Jewell v. Jewell*, 1 How. 219, 231; *Alexander v. Chamberlain*, 1 Thomp. & Cook, 600.

But the appellant could not be aggrieved by the exclusion of a declaration which would disprove his claim, and his exception for such an exclusion could not therefore be sustained.

Yet considering the appellant's claim together with the facts and admissions disclosed in the bill of exceptions, we can have no doubt that the declarations tendered and excluded had a direct bearing upon the issue, and that the question intended to be raised by the parties, is: Whether, in determining who are the rightful distributees of an intestate estate, the declarations of the intestate's sister (since deceased), in whose family he was not only born and brought up, but in which also the intestate herself lived when the appellant was born and for several years thereafter, are admissible for the purpose of showing that he was the natural son of the intestate, who had not then been married.

All of the authorities seem to concur in holding that while her declarations would be competent to show the appellant to be her own illegitimate son, born before her marriage, yet under a rule founded, as Lord MANSFIELD said, "in decency, morality and policy," her declarations would not be allowed to prove her own son illegitimate if born in wedlock. *Goodright v. Moss*, Cowp. 591; 1 Greenl. Ev., §§ 253, 344; *Haddock v. B. and M. Railroad*, 3 Allen, 300; *Abington v. Duxbury*, 105 Mass. 287. Can her declarations be admitted to show the illegitimacy of her unmarried sister's son born and brought up in her own family? This involves no bastardizing of her own issue.

Formerly the declarations of servants, physicians and intimate friends have been admitted at *nisi prius* in the English courts.

Northrop v. Hale.

But in *Johnson v. Lawson*, 2 Bing. 86, the court unanimously rejected the declarations of a deceased housekeeper. BEST, C. J., remarked that the admission of evidence in such cases must be subject to some limits; limiting declarants to relatives connected by blood or marriage afforded a certain and intelligible rule; and if that were passed, an almost endless inquiry as to the degree of intimacy between the family and the declarant might be involved. Since that decision, all modern authorities exclude declarations coming from neighbors, intimate acquaintances, etc., of the family, as being mere hearsay evidence. *Vowles v. Young*, 13 Ves. 147; *Whitelocke v. Baker*, id. 514; *Jackson v. Browner*, 18 Johns. 37, 39. It has therefore become a universally recognized exception to the general rule excluding hearsay, based on various sound considerations, that as to certain facts of family history, usually denominated pedigree, comprising *inter alia*, birth, death and marriage, together with their respective dates, and in a qualified sense, legitimacy and illegitimacy, declarations are admissible: (1) When it appears by evidence *dehors* the declarations that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern. (2) That the declarant was dead when the declarations were tendered; and (3) That they were made *ante litem motam*. 1 Greenl. Ev., §§ 103 *et seq.* and notes; 1 Whart. Ev., §§ 201 *et seq.* and notes; 1 Taylor Ev., §§ 571 *et seq.* and notes; Best Ev. (Am. ed.), § 498 and notes.

Lord Chancellor ELDON said such declarations "are admissible upon the principle that they are the natural effusions of a party who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of the truth, * * that they must be from persons having such connection with the party to whom they relate, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth and cannot be mistaken."

Lord Chancellor ERSKINE declared that the "law resorts to hearsay evidence of relations upon the principle of interest in the person from whom the descent is to be made out." *Vowles v. Young, supra*. This view was adopted by Prof. Greenleaf. 1 Greenl. Ev., § 103. And Mr. Taylor sums up the authorities by declaring such declarations admissible coming from such sources, as relatives "may be supposed to have the greatest interest in seeking the best opportunities for obtaining, and the least reason for falsifying informa-

tion on the subject." 1 Taylor Ev., § 571. Do not the qualifications of Mrs. Northrop come fully up to these requisitions?

In *Goodright v. Moss*, Cowp. 571, the declarations of parents were held admissible, after their decease, to prove that their son was born before their marriage and was therefore illegitimate; and this case is not questioned on this point in *Berkley Peerage* case, 4 Camp. 401.

In *Vowles v. Young*, *supra*, a new trial was granted because the declarations of a husband that his wife was illegitimate were rejected.

In *Hauldock v. B. and Me. Railroad*, *supra*, a mother's declarations were admitted to prove the illegitimacy of her daughter by showing that the mother was never married.

So where the question was whether the plaintiff's mother was the legitimate child of the ancestor, whose land was in dispute and the record showed the latter's marriage at a certain date, the ancestor's declaration — that "unless he made a will, Louisa (plaintiff's mother) could get nothing," was held competent to go to the jury on the question of her illegitimacy. *Viall v. Smith*, 6 R. I. 417. See also *Barnum v. Barnum*, 42 Md. 251, 304.

It would seem therefore that the declarations of the intestate would be admissible to show that the appellant was her illegitimate son; and if the mother's declarations would be, why would not be those of the mother's sister, in whose family the child was born and brought up, and in which the mother lived at the time and for years after.

It is urged that there are some English authorities which somewhat tend otherwise.

In *Bamford v. Barton*, 2 Moody & Ryan, 28, where one K. died seised of land, leaving none but illegitimate children, to whom he willed for life his property with remainder to his own lawful heirs, who brought ejectment claiming the devisees for life to be dead; and to prove it, offered the declarations of one of them, who had since died, to prove the decease of the other, PATTERSON, J., at *nisi prius*, held the declarations inadmissible on the ground that the declarant was not, in point of law, a member of the family of his reputed father." We also entertain the same opinion, and for the same reason.

In *Crispin v. Doglioni*, 2 Swab. & Tris. 44, decided in the Probate Court in England in 1863, the plaintiff claimed to be the natural son

Northrop v. Hale.

of the intestate. To prove it, he tendered the declarations of a deceased brother of the intestate. Sir C. CRESWELL, after remarking there was no case in point, held the declarations inadmissible, saying: "The admissibility of hearsay evidence is exceptional, and ought not to be carried further than the decisions in the books, for it is a departure from the first rule of evidence. I can well understand that when a matter is likely to be discussed and well known in a family, a member of the family may be allowed to give evidence of it; but in this case the plaintiff, according to his own account, is *filius nullius*, by our law. The question is whether a declaration of one brother may be admitted as to another brother having had intercourse with a woman, and having had a child by her; I think it ought to be excluded." We cannot perceive any objection to this ruling. No one can pretend that it comes within the exception admitting hearsay, for the putative father has no relationship with his bastard son, and hence the case is not applicable to the case at bar. Moreover, the case is especially sound in England, and it might there be considered as applicable to a case having the same facts as in the case at bar. For by the common law, in order to "render odious illicit commerce between the sexes and to stamp disgrace on the fruits of it, notwithstanding the punishment usually fell upon the innocent, it was thought wise to prohibit the offspring from tracing their birth to a source which is deemed criminal by law." *Cooley v. Dewey*, 4 Pick. 95. Hence bastards were said by the common law to be the "children of nobody," and could not transmit by descent except to their own offspring. 1 Bl. Com. 459; 2 Kent Com. (12th ed.) 212-3; *Hughes v. Decker*, 38 Me. 153, 160. And such was the law in this State until 1838, when the legislature, as have the legislatures of several other States, ameliorated the rights of illegitimate children. "This relaxation in the laws in so many States," says Chancellor Kent, "of the severity of the common law, rests upon the principle that the relation of parent and child, which exists in this unhappy case, in all its native and binding force, ought to produce the ordinary consequence of consanguinity." 2 Kent Com. (12th ed.) 214. By the statutes of this State, "an illegitimate child is the heir of his mother," and "his estate descends to his mother when he dies intestate without issue." Rev. Stat., chap. 75, §§ 3 and 4.

We are of the opinion therefore that inasmuch as the relationship of sister existed between the intestate and the declarant, and

by force of the statute, that of mother and son between the intestate and the appellant, the declarations came literally within the exception and are consequently admissible; and that the jury should be allowed to pass upon their weight, if they find they were ever made, in connection with the other testimony in the case.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, SYMONDS and EMERY, JJ., concurred.

STATE V. KELLY.

(76 Me. 331.)

Criminal law — murder — jurisdiction — United States fort.

Where a mortal wound is unlawfully inflicted in a fort of the United States, and the victim dies out of the fort, the State courts have no jurisdiction, although the State statute should profess to give jurisdiction.

I

NDIOTMENT for murder.

Henry B. Cleaves, attorney-general, and *Frank J. Baker*, county attorney, for State.

Washington Gilbert, for respondent.

Asa Bird Gardiner, judge advocate U. S. A., and *Wilbur F. Lunt*, U. S. attorney for the district of Maine, for United States.

WALTON, J. The question is whether the courts of this State have jurisdiction of the crimes of murder or manslaughter committed within Fort Popham near the mouth of the Kennebec river.

We think they have not. Fort Popham is a United States fort. It is erected on land purchased for a fort; and the purchase was made by consent of the legislature of this State. The Constitution of the United States declares that Congress shall have power to exercise exclusive legislation over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings; and in the exercise of this power, Congress has enacted what the punishments for murder and manslaughter shall

State v. Kelly.

be when committed within any fort, arsenal, dock-yard, magazine or other place under the jurisdiction of the United States, and conferred authority upon the Federal courts to try the persons charged with these offenses. The conclusion is therefore inevitable that the courts of this State do not have jurisdiction of the crimes of murder or manslaughter committed in a United States fort. In fact we do not know that this proposition is denied by any one.

But it is said that although a mortal wound may be inflicted within a fort, still if the person wounded dies elsewhere, the crime must not be regarded as having been committed in the fort but at the place where the person dies; and that in such a case the courts of the latter place have jurisdiction. It is undoubtedly true that the courts of the latter place do sometimes have jurisdiction. But we are satisfied that when this is so it is not because the crime is to be regarded as having been committed there, but because some rule of law, statutory or otherwise, expressly confers such jurisdiction. The modern and more rational view is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, cannot change the locality of the crime.

And this brings us to the only question in relation to which there can be any doubt in this case; and that is whether our statute which declares that if a mortal wound is inflicted or poison administered on the high seas or without the State, whereby death ensues within the State, such offense may be tried in the county where the death ensues. Rev. Stat., chap. 131, § 3.

Perhaps it is a sufficient answer to say that this statute was not intended to apply to the United States forts which are within our State; that by its terms it applies only to the high seas and other places without the State; that the purchase of land by the United States for a fort, while it confers upon Congress the exclusive power to legislate for it, does not take the land out of the State. It is still within our territorial limits. But we do not rest our decision upon this ground. Another, and as it seems to us a conclusive answer, is that the power of Congress to legislate for the territory on which a United States fort is erected is declared by the Federal Constitution to be exclusive. Consequently there can be no concurrent jurisdiction. And any statute of the State, which should attempt to exercise such a jurisdiction, must necessarily be unconstitutional and void. Congress

 State v. Maine Central Railroad Company.

has provided for the punishment of crimes committed within the forts of the United States. It has expressly provided for the punishment of murder and manslaughter. Rev. Stat. U. S., §§ 5339, 5341, 5343. And conferred exclusive jurisdiction upon the Federal courts. Rev. Stat., § 629, cl. 20. How then can a State court take jurisdiction? Clearly it cannot, unless when a mortal blow or a wound is inflicted in a fort and the person struck or wounded dies out of the fort the crime is regarded as committed where the person dies; and this, as already stated, is a doctrine which we cannot sustain. It is condemned by the weight of modern authority, English as well as American, and is opposed to reason.

The authorities bearing on the question will be found in 1 Bish. Crim. Law, §§ 69, 154; Bish. Crim. Proc., chap. 4; *Commonwealth v. MacLoon*, 101 Mass. 1, and in *U. S. v. Guiteau*, 1 Mackey, 498; s. c., 47 Am. Rep. 247.

The plea in abatement is sustained, and the prisoner surrendered to the United States authorities.

PETERS, C. J., DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

 STATE V. MAINE CENTRAL RAILROAD COMPANY.

(76 Me. 357.)

Negligence — contributory — presumption.

One in the full possession of his faculties, who undertakes to cross a railroad track when a train of cars is about passing, and is struck by it, is *prima facie* guilty of negligence.* (See note, p. 628.)

CONVICTION of negligent killing of a person. The opinion states the point.

J. Hutchings and F. H. Appleton, county attorney, for State.

Wilson & Woodward, for defendant.

WALTON, J. This is an indictment against the Maine Central Railroad Company for negligently causing the death of a person. It appears that December 26, 1882, at about half-past six o'clock

* *Contra, Penn. R. Co. v. Weber* (76 Penn. St. 157), 18 Am. Rep. 407. See also *Cassidy v. Angell* (12 R. I. 447), 34 Am. Rep. 690, and note.

State v. Maine Central Railroad Company.

in the evening, Dr. Pickard, of Carmel, in an attempt to cross the railroad with a horse and sleigh, was struck by a passing train and instantly killed. A trial has been had and a verdict of guilty returned against the railroad. The question is whether the evidence justified this verdict. We think it did not.

It is settled law in this State, that in prosecutions of this kind, whether in form civil or criminal, the burden is upon the party prosecuting to show that the person injured or killed did not by his own want of ordinary care contribute to produce the accident. *Gleason v. Bremen*, 50 Me. 222 ; *State v. Grand Trunk Railway*, 58 id. 176; s. c., 4 Am. Rep. 258.

In the case first cited it was held that the law is clear and unquestioned that the plaintiff must satisfy the jury, as an affirmative fact, to be established by him, as a necessary part of his case, that at the time of the accident he was in the exercise of due care. And in the second case cited it was held, after a full and careful examination of the question, that in the trial of indictments against railroads to recover the forfeiture created by our statute for negligently causing the death of a person, "the same rules of evidence and the same principles of law should be applied, as in like cases when redress is sought by a civil action for damages."

We must therefore regard it as settled law in this State that in this class of cases, whether in form civil or criminal, the burden of proof is upon the party prosecuting to show due care on the part of the person injured or killed, at the time of the accident ; or in other words, that his want of due care did not contribute to produce the injury complained of.

In this case, there is not only a total want of such evidence, but the proof, as far as it goes, tends strongly to establish the contrary. No one witnessed the accident except the engineer and fireman on the train. The engineer's account of the transaction is that as he approached the crossing, and when the engine was not over fifteen feet from it, the horse came right up into the head-light, and the pilot of the engine took right under the sleigh, and threw the deceased right up on to the head-board; that he stopped the train as soon as he could, and went forward and found the man dead upon the front of the engine. The fireman says he saw nothing till they went on to the crossing; that he then got a glimpse of a horse and saw a man come up on to the pilot. These are the only accounts we get of the transaction. How it happened that the deceased drove

State v. Maine Central Railroad Company.

on to this crossing directly in front of an approaching train is left to conjecture alone.

It is claimed that no bell was rung or whistle sounded; and that in consequence of this failure the deceased was not apprised of the approach of the train. The evidence seems to us to preponderate most overwhelmingly in favor of the fact that the bell was rung and the whistle sounded. But suppose they were not, still it seems to us impossible to believe that the deceased undertook to cross the track in ignorance of the approach of the train. He was a man of mature years, and in the full possession of his faculties. His sight and hearing were good. He lived in the immediate neighborhood of this crossing, and must have been acquainted with the time and speed of the trains. The evening was still, and the ground frozen, and the rumbling of the train could be heard at a great distance. The head-light was on, and the cars all lighted, and the deceased's view of an approaching train for a considerable portion of the way as he drove from his house to the crossing unobstructed. If under the circumstances the deceased undertook to cross the track in ignorance of the approach of the train, the inference is irresistible that he did not exercise that degree of vigilance which the law requires. He could not have used his eyes nor his ears as the law required him to use them. The fact must not be overlooked that the train was very near, as otherwise he would not have been struck by it. One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is in fact, struck by it, is *prima facie* guilty of negligence; and in the absence of a satisfactory excuse, his negligence must be regarded as established. The excuse offered in this case is not satisfactory. The evidence so overwhelmingly preponderates in favor of the fact that the bell was rung and the whistle sounded that we cannot regard the alleged negligence of the railroad company in these particulars as proved. But if we concede that this was a question of fact for the jury, and that the court has no right to interfere with their finding, still the inference is irresistible that the deceased did not exercise that degree of vigilance which the law requires, or he would have known of the approach of the train without these signals. And if not ignorant of its approach (which we believe to be the fact) then the relation of cause and effect between the alleged negligence and the accident is wanting;

State v. Maine Central Railroad Company.

and the verdict must be regarded as wrong upon that ground. It is not enough to establish negligence and an accident. It must also be shown that the negligence was the cause of the accident. An omission to ring the bell or sound the whistle could not have been the cause of the accident if the deceased had notice of the approach of the train by other means. Our belief is that the deceased did have such notice; that he could not have been so unobservant as to neither see nor hear the approach of that train; and consequently that the alleged negligence in omitting to ring the bell or sound the whistle could not have been the cause of the accident. But if he did not have such notice; if he drove on to that crossing in total ignorance of the approach of a train; then the conclusion seems to us inevitable that he must have been exceedingly negligent in the use of his eyes and his ears. So that whichever view we take, the verdict is clearly wrong. In the one case the want of the relation of cause and effect invalidates it; in the other, contributory negligence.

Similar views are expressed and similar conclusions sustained, even in those States in which it is held that the burden of proof to show contributory negligence is on the defendant. *A fortiori* they ought to prevail, where as in this State the burden of proof is not upon the defendant to show contributory negligence, but upon the party prosecuting to show the absence of it.

In *Railroad v. Heilman*, 49 Penn. St. 60, the court held that the omission of a traveller when approaching a railroad crossing to look and listen for approaching trains is negligence *per se*; not merely evidence of negligence, but negligence itself, and should be so declared by the court, and not submitted to the jury; that while it is true that what constitutes negligence is generally a question of fact for the jury, it is not always so; that when the law fixes the standard of duty an entire omission to perform it is not merely evidence of negligence to be submitted to a jury, it is negligence itself, and should be so declared by the court; that even on a common road, travellers must look out for the approach of other vehicles passing; that this is more necessary at railroad crossings, because movements upon a railroad are more rapid, and because the consequences of a collision are likely to be more disastrous; that precaution, looking out for danger, is a duty imposed by law, and that to rush heedlessly on to a crossing over which the law allows engines of fearful power to be propelled, without looking and

listening for a coming train, is not merely an imperfect performance of duty, it is an entire failure of performance.

And in *Railroad v. Beale*, 73 Penn. St. 504 ; s. c., 13 Am. Rep. 753, Mr. Justice SHARSWOOD, in delivering the opinion of the court, says that there never was a more important principle settled than that which declares that the omission to look and listen for the approach of trains before attempting to cross a railroad track is not merely evidence of negligence to be submitted to a jury, but negligence *per se*, and to be so declared by the court; that it is not so important to the railroad companies as to the travelling public; that the omission of this duty often results in collisions by which the lives of hundreds of passengers are lost; and that travellers should be taught that the performance of this duty is due, not only to themselves, but to others also.

In *Railroad v. Crawford*, 24 Ohio St. 631; s. c., 15 Am. Rep. 633, the law upon this subject seems to us to be stated accurately. It is there said that unquestionably ordinary prudence requires a person in the full enjoyment of his faculties, before attempting to pass over a known railroad crossing, to use his faculties of hearing and seeing for the purpose of discovering and avoiding danger from an approaching train ; and that the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action to recover for an injury to which such negligence contributed.

In *Dascomb v. Railroad*, 27 Barb. 221, it is said in a case very similar to the one we are now considering, that when negligence is the issue, it must be a case of unmixed negligence; that this rule is important, salutary in its effects, and should be maintained in its purity; that the careless are thereby taught that if they sustain an injury to which their own negligence has contributed the law will afford them no redress.

In *Wilcox v. Railroad*, 39 N. Y. 358 (a case in every essential particular like the one now under consideration), the court held that when one is killed in attempting to cross a railroad track within the limits of a public highway, and at a public crossing, if it appear that the deceased would have seen the approaching cars, in season to have avoided them, had he first looked before attempting to cross, it is to be presumed that he did not look; and that by omitting so plain and imperative a duty, he will be deemed to have been guilty of negligence, which precludes a recovery; that in crossing

State v. Maine Central Railroad Company.

a railroad track ordinary sense, prudence and capacity require a traveller to use his ears and eyes so far as he has an opportunity to do so, and a failure to do so is negligence sufficient to preclude a recovery for any injury he may receive, in case of accident; and that the negligence of the company in not ringing the bell or sounding the whistle is no excuse for the traveller's neglect. After citing many authorities, Mr. Justice MILLER said: The effect of the cases cited is to sustain the principle, that where the negligence of the party injured or killed contributes to produce the result, he cannot recover; and that the omission of the company to ring the bell or sound the whistle near the crossing of a highway does not relieve the person who is about to pass over the highway from the obligation of employing his sense of hearing and seeing, to ascertain whether a train is approaching.

In *Railroad Company v. Houston*, 95 U. S. 697, it was held that the omission of the engineer in charge of a railroad train to sound its whistle or ring its bell does not relieve a traveller from the necessity of ascertaining by other means whether or not a train is approaching; that negligence of the employees of the company is no excuse for negligence of the traveller; that the traveller upon the highway is bound to listen and to look, before attempting to cross a railroad track, in order to avoid an approaching train, and not to go carelessly into a place of possible danger; that if he omits to look and listen, and walks thoughtlessly upon the track, or if looking and listening, he ascertains that a train is approaching, and instead of waiting for it to pass, undertakes to cross the track, and in either case receives an injury, he so far contributes to it as to deprive him of all remedy against the railroad company; that if one chooses to take risks, he must suffer the consequences; that they cannot be visited upon the railroad company; that in such cases it would not be error to instruct the jury peremptorily to return a verdict for the defendants.

The cases in which similar views are expressed are very numerous. But the soundness of the views expressed in the cases already cited is so self-evident, that we deem it unnecessary to cite other cases to support them. It will be seen that it is not important to determine whether Doctor Pickard's negligence consisted in not ascertaining that a train was approaching, or in knowingly attempting to cross in front of it. In either case, it defeats a recovery. And in the latter case, for the further reason that it destroys the rela-

State v. Maine Central Railroad Company.

tion of cause and effect between the alleged negligence of the defendants and the accident.

[Minor consideration omitted.]

Motion sustained and verdict set aside.

PETERS, C. J., DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

NOTE BY THE REPORTER.— See *contra*, *Penn. R. Co. v. Weber*, 76 Penn. St. 157; s. c., 18 Am. Rep. 407. See also *Cassidy v. Angell*, 12 R. I. 447; s. c., 84 Am. Rep. 690.

In *Philadelphia, etc., R. Co. v. Stebbing*, 62 Md. 504, the court said: "In all these cases where negligence is the ground of the action, and the plaintiff was not a passenger of the defendant at the time of the injury received, the *onus* of proof is upon the plaintiff to trace the cause of his injury directly to the fault or neglect of the defendant, and to do this he must show the circumstances under which the injury was received. And if from the circumstances thus shown it appears that the fault was mutual and concurrent, and the plaintiff is justly liable to have fairly imputed to him direct contributory negligence in the production of the accident, he shows himself to be disentitled to recover. *Frech v. P. W. and B. R. Co.*, 39 Md. 574; Cooley on Torts, 673. The principle laid down by an eminent English judge, and which was approved by the Court in Exchequer Chamber, and by the House of Lords, *Daniel v. Metropolitan Ry Co.*, L. R., 3 C. B. 591; *ld.*, 5 H. L. 45, is clearly a correct one, and that is, that it is not enough for the plaintiff to show that he has been injured by an accident upon the defendant's road, and thence to argue that the defendant is liable even *prima facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to; and further that the plaintiff should also show with reasonable certainty what particular precautions should have been taken to avoid the accident. Here, according to the contention of the plaintiff, the accident resulted from the unauthorized rate of speed with which the train was run through the town, and the neglect to give signals of the approach of the train. These facts are material, and in regard to which, as we have seen, the evidence is conflicting, making a question appropriate for the jury."

"If the defendant's train was in fact run through the town at a greater rate of speed than that allowed by the ordinance, it may be conceded that such running was of itself negligence, and a violation of the ordinance, for which the engineer would incur liability for the penalty prescribed. But, while that may be so, it would be quite immaterial to the case of the plaintiff, unless it be shown that the injury complained of was occasioned by such unauthorized speed of the train, without any direct contributory negligence on the part of the plaintiff himself. If he knew of the near approach of the train in time to get out of the way of danger and failed to do so, he could have no right of action, though the train was run at a rate of speed greater

State v. Barrows.

than that allowed by the ordinance. In such case, the fact that the train was run at an unauthorized rate of speed would in no way relieve him of the consequences of his own negligence, and afford him a right of action against the defendant."

"It is certainly true, the motive to self-preservation is a principle of our common nature, and it is but rational to presume, in the absence of evidence to the contrary, that parties act under its promptings in view of impending danger. But in such cases as the present, there is a counter presumption, when the proof does not show to the contrary, and that is, that every person charged with a duty involving the safety of himself or others, will perform that duty; so that in fact it is not often the case that these mere presumptions afford much assistance in arriving at correct or just conclusions. They ought not to be indulged to the exclusion of direct evidence to the contrary; and it is only where there is no reliable proof to the contrary, or there is rational doubt upon the evidence as to the acts or conduct of the parties, that such presumptions can properly be invoked. The jury ought not to be instructed in such terms as would justify them in acting upon the mere presumption of the absence of fault in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them."

"It will not do to instruct them that it is competent to them, in connection with the facts and circumstances of the case, irrespective of the nature and force of such facts and circumstances, to infer the absence of fault on the part of either plaintiff or defendant, from the known general disposition of men to avoid danger. Such an instruction in many cases would be exceedingly misleading; and we think it was error to give it in this case in the form in which it was given."

STATE V. BARROWS.

(76 Me. 401.)

Criminal law — evidence — testimony of co-defendant.

Where by statute an indicted person may testify on his own behalf on the trial of the indictment, one of two jointly indicted may testify against his co-defendant on his separate trial, although the indictment against himself is still pending and he has pleaded not guilty.

CONVICTION of murder. The opinion states the case.

Henry B. Cleaves, attorney-general, and *Frank M. Higgins*, county attorney, for State.

Ira T. Drew, *Wm. Emery*, and *John B. Donovan*, for defendant.

State v. Barrows.

PETERS, C. J. Mary E. Barrows and Oscar E. Blaney were jointly indicted for murder. She was separately tried. Blaney, without any further disposition of the indictment as to him than his plea of not guilty, was called as a witness against her. The bill of exceptions presents the question whether if two are indicted jointly and one pleads not guilty, his testimony, if he consents to be a witness, is admissible for the State on the separate trial of the other defendant.

In this State it is a question to be decided upon the principles of the common law as amended or modified by statutory provisions.

As a question simply at common law, although there is a contradiction in the cases, the preponderance of authority seems to favor the admission of a co-defendant, not on trial, as a witness if called by the prosecution. There is very much less authority allowing him to be sworn as a witness for the defense. Whether the distinction be a sensible one or not it has prevailed extensively. There are really but a few adjudged cases upon the point whether such testimony is admissible for the State, for the reason probably that a prosecuting attorney can avoid the question by omitting to indict one party, or by obtaining separate indictments. The defendant having no such election, the cases affecting the testimony in his behalf are more numerous.

Most of the authors on evidence evidently adopt the view that the testimony is admissible when offered by the State. Although but little authority is adduced to support their statements, and the doctrine is not very clearly or positively stated in some instances, still such a general concurrence of favorable expression has much weight upon the question. It goes far to show the common opinion and practice. Hawk. P. C., book 2, chap. 46, § 90; 1 Hale P. C. 305; 2 Stark. Ev. 11; Roscoe Crim. Ev. (9th ed.) 130, 140; 2 Russ. Crimes, 957. Mr. Wharton says, "An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a co-defendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered." Whart. Cr. Ev. (8th ed.), § 439. Mr. Greenleaf states the same rule. He says, "The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he

State v. Barrows.

has not been put on his trial at the same time with his companions in guilt." 1 Greenl. Ev., § 379.

The counsel for the defendant places especial reliance on Mr. Bishop as an opposing authority. That learned commentator evidently attaches more weight to that side of the question than other writers do. 1 Bish. Cr. Proc. (3d ed.), §§ 1020, 1166. But Mr. Bishop states that all the cases are not in accord with his text, and also says in a note to the section cited *supra*, that the late English doctrine seems to differ from the rule recognized by him. We find it to be so. Late English cases are quite emphatic to that effect. *Queen v. Thompson*, L. R., 1 C. C. 378; *Queen v. Winsor*, L. R., 1 Q. B. 390; *Queen v. Payne*, L. R., 1 C. C. 349; *Queen v. Deeley*, 11 Cox. C. C. 607. The defendant's counsel however in their able and exhaustive brief contend that the late English cases are based upon acts of Parliament in amendment of the common law. It cannot be so, for Chief Justice COCKBURN in *Queen v. Payne*, *supra*, declares the rule to be according to the law "as it has existed from the earliest times," and other judges gave their opinion that the new enactments were not intended to apply to criminal cases. See cases, *supra*. The question before us does not appear in any reported case in this State. *State v. Jones*, 51 Me. 125, approaching the question nearer than any other case, merely decides that when two are indicted and one pleads guilty, his testimony is admissible for the other defendant. KENT, J., says in the opinion: "It seems to be settled that he cannot be thus called whilst the charge in the indictment is pending and undisposed of against him; and this whether he is to be tried separately or jointly." That is, the defendant be called by the co-defendant. The latter remarks are a correct statement of the law of New York, and New York cases are cited in support of it. See 17 Alb. L. J. 421. In 1876 however the privilege of calling a co-defendant to testify, before that time possessed by the prosecution only, was extended by a legislative enactment to all parties. 18 Alb. L. J. 160. The case of *Lindsay v. People*, 63 N. Y. 143, relied upon by the defendant's counsel, upon a correct understanding of it does not contradict previous decisions in that State.

The argument against the admission of such evidence does not strike us with much force. It is almost universally admitted that an accomplice separately indicted may be a witness for the State, and any distinction arising between trials on a joint indictment and

trials on separate indictments is not readily appreciated. The crime is supposed to be jointly committed in either case. If there are separate indictments, the fact of joint criminality is not withheld from the jury. It is not improper to aver it by way of recital or description. The interest and motives of the witness must be the same whether he is to be afterward tried under the same or another indictment. As said by BEASLEY, J., in a convincing argument of the question in *State v. Brien*, 3 Vroom, 414: "The only reason for the rejection of such a witness is, that his own accusation of crime is written on the same piece of paper with the charge against the culprit whose trial is in progress."

The reason at first given for not allowing a party to testify was his interest. The old common law shuddered at the idea of any person testifying who had the least interest. But that reason failed sometimes. In many civil cases a party had no interest. Then it was decided that public policy or expediency prevented the reception of the testimony. A party to the record was not permitted to testify, whether interested or not. If only a nominal plaintiff, he could not testify either for the plaintiff or defendant. *Kennedy v. Niles*, 14 Me. 54. Without much reasoning upon the subject, the law pronounced against it. The rule was general. But as stringent as the rule was, it did not apply to indictments to its full extent. The parallel between civil and criminal cases was not kept up. If a man was indicted and pleaded guilty, he could testify for his co-defendant. *State v. Jones, supra*. If however he was sued for the same cause, and became defaulted, he could not testify for his co-defendant. *Gilmore v. Bowden*, 12 Me. 412. Courts seemed inclined not to regard a co-defendant in a criminal case as a party, unless "a party to the issue on trial." That distinction is taken in the English cases before cited. To be incompetent to testify, the defendants must be in charge of the same jury. Mr. Starkie struck the same key, who declared that "an indictment against several is several as to each." It is plainly seen that there is much authority and reason for regarding an indictment of two or more persons as in effect a joint and several indictment; joint when the accused are tried jointly; and several when tried separately.

But as before intimated, we are not to look upon the question before us as exclusively one at common law. Our statutory enactments bear upon it. They have weakened if not abrogated the argument of public policy. It was, no doubt, the design of the

State v. Barrows.

legislature that the objection to the competency of parties as witnesses should be removed in both civil and criminal cases. In civil cases the door is opened wide. In criminal cases the provision is this: "In all criminal trials, the accused shall, at his own request, but not otherwise, be a competent witness * * * The husband or wife of the accused is a competent witness." Rev. Stat., chap. 134, § 19. While this enactment does not cover the present question with literal exactness, it approaches it, affects and influences it, and requires us to examine the matter in the light of the legislative policy declared by it. If both defendants were on trial at the same time either could testify. *Com. v. Brown*, 130 Mass. 279. If the argument for the defendant is sound, then the common-law rule has become reversed. Defendants can testify against each other when tried together, and cannot so testify when tried apart. We do not assent to such a proposition.

The admission of the evidence did no injustice. It bore less heavily upon the defendant than it would have if the witness had not been himself indicted. As Lord HALE says, the indictment against him "doth much weaken and disparage his testimony." It would present a singular inconsistency in criminal procedure, if even one's wife may be compelled to testify against him, and a co-defendant, on trial, may be called from the dock to the witness stand, but a companion in guilt, included in the same indictment, not on trial, be excluded therefrom.

Exceptions were taken to some portions of the charge of the judge to the jury. No argument has been submitted in their support. They are clearly untenable, and require of us only a passing word.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

Atwater v. Sawyer.

ATWATER v. SAWYER.

(76 Me. 588.)

Innkeeper — refusal to receive guest.

An innkeeper is not justified in refusing to receive a member of a militia company as a guest, merely because other militiamen, received as guests on the same occasion, had misconducted in the inn.

ACTION for refusing to receive a guest at an inn. The opinion states the case. The plaintiff had judgment below.

Josiah Crosby, for plaintiff.

Humphrey and Appleton, for defendant.

EMERY, J. 1. Was the offered testimony as to the conduct of third parties in the defendant's inn just before the entry of the plaintiffs, and as to the effect of such conduct on the defendant's mind, admissible? An innkeeper's right to exclude from his inn all disorderly persons; all persons who come with an intent to make an assault, or to insult him or his customers; and the right to exclude such without waiting until the assault was made, or the affray begun, or the insult perpetrated, may be admitted. *Markham v. Brown*, 8 N. H. 523. The defendant further claims however that when he has reasonable cause to believe such conduct is intended, he may exclude though no such intent may have, in fact, existed. No authority is cited for this last proposition, nor is its applicability clearly manifest. These actions are not for an exclusion from the inn. The exceptions do not show any attempt to exclude the plaintiffs from the house. They were admitted to, and allowed to remain in the house without objection. The only act complained of was the refusal to furnish dinner.

If however the proposition be correct and applicable, the offered testimony would not be admissible unless it logically tended to prove a reasonable cause for such belief. The bill of exceptions states, that some eighty or a hundred men, members of two militia companies, and clad in the uniform of the Maine militia, arrived in town on the day named; that "more or less" of them (how many is not stated) went to the defendant's inn, and there behaved in a

Atwater v. Sawyer.

disorderly and insulting manner. These plaintiffs, though members of the militia companies, were not of this disorderly party, nor with them. It is not claimed that the plaintiffs were otherwise than sober, orderly and respectable. The only connection shown between them and the disorderly ones was their membership of the same militia companies. It is not even shown they were of the same company. The only similarity in appearance was in the uniform. Such membership was honorable, and there was not in that any reasonable cause to believe the plaintiffs intended insult. The uniform was honorable and the rightful wearing it by the plaintiffs was no reasonable cause for apprehension of insult. We do not know how many of the organization had misbehaved. We have no right to assume the number was large. We ought rather to assume the number was small. It would be illogical and unjust to say, there was reasonable cause to believe that every member of those companies meditated misconduct because a small number of them had already misconducted. Yet if there was reasonable cause to fear insult from the plaintiffs, there was equal cause to fear it from every member.

The defendant's claim that he could not distinguish between the plaintiffs and the others cannot be admitted against the plaintiffs' right to entertainment. The plaintiffs were not with the others. Their rights cannot be abridged by the similarity in appearance to other persons not present. It was the defendant's duty to discriminate.

We think the offered testimony, taken in connection with the facts shown by the exceptions, fall short of a logical tendency to prove a reasonable cause for the defendant's alleged apprehensions.

[Minor consideration omitted.]

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN and FOSTER, JJ., concurred; HASKELL, J., concurred in the result for the following reasons:

HASKELL, J. The plaintiffs applied for dinner at the defendant's inn and were refused it. For damages suffered thereby this action is brought. Soldiers in uniform came to the defendant's inn, and behaved in a disorderly manner, and threatened to turn him and his house into the street.

Defendant offered to prove that the plaintiffs were refused enter-

Atwater v. Sawyer.

tainment, because they wore the same uniform, indicating that they belonged to the same band, and claimed that he could not discriminate between them and the disorderly soldiers. The evidence was excluded.

The defendant was not required by law to furnish entertainment for intoxicated or disorderly persons. If he had reason to suppose that the plaintiffs belonged to the same band of disorderly soldiers, who had threatened to despoil his house, and that they were evil disposed toward him, or had conspired with the disorderly soldiers to harm his house, or guests, or if they were intoxicated, or disorderly persons, then he would have been justified in refusing them entertainment, and the question should have been submitted to the jury; but the evidence excluded falls short of what would be a justification in the premises, and for that reason was properly excluded.

[Minor consideration omitted.]

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

NORTH CAROLINA STATE LIFE INSURANCE COMPANY V. WILLIAMS,

(91 N. C. 69.)

Agency — contract between insurance company and agent — termination.

A life insurance company contracted to pay its agent certain commissions for procuring insurance and for renewals, without specifying any term of duration. The company went out of business and assigned the policies so procured to another company. *Held*, that this terminated the agent's right to commissions on renewals.

ACTION to recover commissions detained. The head-note states the case. The plaintiff had judgment below.

Walter Clark and J. L. Bridgers, Jr., for plaintiff.

George Howard, for defendant.

SMITH, C. J. The only question presented is in reference to the construction of the contract of agency, and the rights of defendant thereunder.

The entire structure of the agreement for the creation of the agency, while silent as to its duration, evidently contemplates a continued connection between the service to be rendered and the

compensation provided therefor, terminable at the election of either party. It may be put an end to by the principal. Story Agency, § 463; by the renunciation of the agent, § 478; by operation of law where an incapacity in either party to maintain the relation is brought about, § 481.

The exception to the rule is where the agency is associated with an interest, and then it is not revoked nor revocable by the principal to the detriment of the agent. What such an agency is, is thus explained by Chief Justice MARSHALL in the opinion in *Hunt v. Rousmanier*, 8 Wheat. 174, cited in brief of plaintiff's counsel: "We hold it to be clear," say the court, "that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words the power must be engrafted on an estate in the thing. The words themselves seem to import this meaning. A power coupled with an interest is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united."

Tested by the rule thus laid down it is manifest that when the authority to insure ceases, the capacity of the agent ends also, and the relation of the parties terminates.

Accepting this, the defendant claims compensation in damages for the withdrawal of the power to continue to act in the renewals, and measures his loss by the sum he would have received as commissions had he been permitted to act in two renewals made since the transfer.

This contention involves the assumption that the contract confers an absolute and permanent right to proceed with renewals when the original insurance was effected through the efforts and instrumentality of the defendant when he can no longer act as agent in making the renewals.

Such is not the fair interpretation of the terms of the contract which allows the specified commissions as compensation for services to the company in the renewals, and necessarily ceases when the services cease.

The right to compensation is associated with a continuance of services, and the compensation is the agreed measure of their value. When the policy first issues, the per centum specified becomes due,

Wood v. Sugg.

and on each renewal the reduced per centum is allowed. Very manifestly the scope of the agreement conferring the authority is to provide the measure of remuneration for what the agent may do while he remains such and no further. He was not to be paid for renewals afterward made unless participated in by him while in possession of authority to renew. Although renewals are the consequence of the original contract of insurance, and in this particular beneficial to the company, yet the full compensation given and accepted for this service is the twenty-five per centum on the sum received, provided in the contract which creates the agency and regulates its terms. This is in our opinion a fair and reasonable interpretation of the instrument, and the result is adverse to the counter-claim.

It must be declared there is no error in the ruling and the judgment must be affirmed.

Affirmed.

No error.

WOOD V. SUGG.

(91 N. C. 98.)

Partition — of remainder.

Partition cannot be had of an estate in remainder.

PARTITION. The opinion states the case. The defendant had judgment below.

Faircloth & Allen and George M. Lindsay, for plaintiffs.

H. F. Murray and W. C. Munroe, for defendant.

ASHE, J. [Omitting other points.] The defendant Sugg, by means of the several conveyances set forth in the record, became the owner of her life estate, and by purchasing the interest of two of the four heirs of Jonathan Wood, he became, by the merger of a moiety of the life estate of his two undivided shares of the remainder, the owner in fee simple of an undivided half of the land, and the owner of an estate for the life of Emily J. Wood in the

other moiety owned by the plaintiffs. In other words, the defendant is the owner of one moiety in fee simple, and the plaintiffs are the owners of a moiety of the remainder.

At the common law, parceners only were compellable to make partition by a writ of partition, but the benefit of that writ was extended to joint tenants and tenants in common by the statute of 31 and 32 Henry VIII. By the former statute, none but tenants of the freehold who had estates of inheritance could have partition, and only against tenants of the freehold. By the latter, tenants for life or years might have partition, but not to affect the reversioner or remainderman. The essential provisions of these statutes are still in force in this State, with only a modification of the remedy. In 1787 an act was passed by the general assembly which gave to tenants in common of real estate the petition for partition, in place of the ancient writ of partition. Act 1787, chap. 274, § 1 (brought forward in the Revised Statutes and Revised Code). The construction put upon this statute is, that it applied only to such co-tenants as had seisin where the estate was freehold, but had no application to reversioners or remaindermen. *Maxwell v. Maxwell*, 8 Ired. Eq. 25; *Hassell v. Mizell*, 6 id. 392. And in so holding this court has followed the English decisions in construing the statute of Henry VIII. Our act of 1787 has made no change in the principles of law applicable to partition, but has only changed the remedy.

Mr. Freeman, in his work on Co-tenancy, says: It is a general rule prevailing in England without exception, and also throughout a majority of the United States, that no person has the right to demand any court to enforce a compulsory partition, unless he has an estate in possession; one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the co-tenants thereof. § 446. The same doctrine is announced and maintained in 1 Washb. Real Property, chap. 13, § 7, sub-div. 7.

In New York it has been held that proceedings in partition can be instituted only by a party who has an estate entitling him to immediate possession. *Brownell v. Brownell*, 19 Wend. 367. See also *Miller, Ex parte*, 90 N. C. 625.

In New Hampshire it is held: "To maintain a proceeding for partition the applicant must show a present right of possession." 36 N. H. 327. And again, that "one who is interested with others in a remainder or reversion, after an estate of freehold, cannot main-

Baity v. Cranfill.

tain a petition for partition of the lands in which he is so interested." 8 N. H. 93.

We might multiply authorities, but we deem those cited are sufficient to show that the principle is well established, that co-tenants in remainder or reversion have no right to enforce a compulsory partition of land in which they have such estate.

We are of opinion there is no error in the judgment of the Supreme Court.

Affirmed.

No error.

BAITY V. CRANFILL.

(91 N. C. 298.)

Constitutional law — regulation of marriage — retrospective operation.

A statute prohibited marriage between persons nearer of kin than first cousins, and a subsequent statute provided that such marriage followed by birth of issue should not be declared void after the death of either party. *Held*, that the proviso applied to prior marriages.

PROCEEDING to sell land of an intestate. The opinion states the case. The defendant had judgment below.

Watson & Glenn and J. A. Williamson, for plaintiff

J. M. McCorkle and E. L. Gaither, for defendant.

SMITH, C. J. The defendant is a son by a former wife of the plaintiff's intestate, who after her death intermarried with Mahala Triett, his niece, on the 26th day of November, 1869, and lived with her in the relation of husband and wife until his own death, in the year 1873. The issue of their marriage were two children, of whom one died before and the other (bearing his father's name) after the institution of the present suit.

After the grant of letters of administration to the plaintiff upon the intestate's estate, the said Mahala, as his surviving widow, made application and had assigned to her in due course of law her year's allowance, almost entirely in specific articles, with a small sum to be paid in money for the deficiency which passed into her posses-

Baity v. Cranfill.

sion and absorbs the personal estate. She also instituted her action against the defendant Elkana and the son Levi, the heirs at law of the deceased husband, under and pursuant to which her dower was allotted and assigned in his descended lands. The defendants made no resistance to the claim of dower or the assignment when made, and informed the Probate judge when he made the appointment of administrator that the said Mahala was the widow of the intestate and her child one of his next of kin.

The present action, now depending against the said Elkana alone as heir at law of the intestate, is to obtain an order of sale of the descended lands for the payment of debts of the decedent, and is opposed upon the ground that the marriage with said Mahala, because of their near relationship, was and remained void, and the delivery of the articles to her for her year's support under the assignment of the commissioners was a *devastavit*, for the value of which the plaintiff is personally responsible, and must account for and apply to the indebtedness before the lands can be sold for that purpose.

Two propositions are involved in the defense, and are necessary to its success, and these are:

1. The absolute and continued nullity of the marriage, and
2. The liability of the administrator for the loss of the personal estate adjudged to the widow. The law in force at the time when the marriage was solemnized is found in the Revised Code, chap. 68, section 9, and is in these words: "All marriages contracted after the twenty-seventh day of December, eighteen hundred and fifty-two, and all marriages in future between persons nearer of kin than first cousins, shall be void."

These and marriages contracted between a white person and a free person of color to the third generation, are the only marriages prohibited and made void by express statutory provisions, other causes of nullity being left to operate as at common law.

The legislation contained in this chapter is superseded by the enactment of February 12, 1872, to be found in Bat. Rev., chap. 69, the second section of which defines the impediments in the way of a lawful and valid marriage, among them being a marriage "between any two persons nearer of kin than first cousins," and declares such to be void, subject to a proviso subjoined as follows:

Provided that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the par-

Baity v. Cranfill.

ties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or Indian, or of negro or Indian descent to the third generation inclusive, and for bigamy.

Section 2 of chapter 37 of Bat. Rev., confers upon the superior courts jurisdiction in term time of marriages contracted contrary to the prohibition in section two of chapter 69, or therein declared void, to declare and adjudge "such marriage void from the beginning, subject nevertheless to the provision contained in said section," and already recited.

The succeeding section declares that the marriages interdicted between a white person and one of negro or Indian blood within the degree specified, "shall be absolutely void to all intents and purposes and shall be so held and declared by every court at all times whether during the lives or after the death of the parties thereto." Bat. Rev., chap. 37, sections 2 and 3.

Again the general assembly further amended the law by extending the inhibition arising from kinship to those of half blood, but with a proviso that this shall not invalidate a marriage theretofore contracted, and that the computation as to existing marriages shall be by counting relations of the half blood as being only half so near kin as those of the same degree of the whole blood. Acts 1879, chap. 78.

These statutory provisions are referred to, as indicating, as in our opinion they clearly do, an intention to confine the power conferred upon the court to declare void, or in a judicial proceeding to treat as void, except where the inter-marriage is between the specified races or involves the offense of bigamy, to cases, whenever the power is exercised, during the life-time of the parties, or after death, only when there has been no issue born to them. The structure and interdependence of these several sections are in harmony only when such an interpretation is put upon the proviso first quoted.

It speaks prospectively as to the exercise of the judicial authority bestowed, but it is an authority to be exercised upon all subsisting marriages before specified, when the relation may have been entered into, as well as such as may thereafter be formed. The words are "that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except," etc., thus imposing restraints after death not attaching during life.

If this is not the intent, why was it necessary in the act. of 1879 placing kinship of the half blood upon the same footing as kinship of the full blood, that the authority to declare void the marriages between persons so related heretofore contracted should not be exercised unless in other cases of previous marriage it might be exercised? It is indeed in the nature of a statute of limitation upon the delegated or recognized judicial power, confining its exercise with a single exception to the life-time of the parties, and if cohabitation and offspring followed, withholding it afterward, so as not to operate as a posthumous bastardizing of children born to them. It is but saying to the parties thus living together and assuming the marital relation that it shall not be disturbed after death to the injury of innocent offspring. This is in our opinion the manifest purpose expressed in the legislation.

2. Is this legislation, so interpreted and understood, effectual in its operation upon pre-existing marriage contracts or is it ultra-constitutional?

The competency of the general assembly to impose implies the right to remove the restraints and conditions incident to the formation of the marriage relation and the contract which creates it. There are no vested rights in the present case to be affected by the legislation. Its force is spent in fixing the personal status of parties at the death of one of them, and placing it beyond the disturbing power of the court. Its declaration to the living is that the actual status then subsisting, where a child is born, shall be and remain a legal status when death comes and dissolves the relation for the future. The parties come under the operation of this law and choose to acquiesce in the announced result, when the relation remains unbroken in life.

We see no substantial reason for denying to the legislature the right to remove impediments that itself created, to a valid and effectual marriage, and which but for a positive act would not exist. In *Moore v. Whitaker*, 2 Harr. 50, where a similar disability from near relationship was imposed by the general law and was removed by a special enactment applicable to a single case, the court uses this forcible language in answer to a similar objection: "The disability was a statutory one. The legislature has the power to declare what shall be valid marriages. They can annul marriages already existing, *a fortiori*, they can render valid marriages which when they took place were against law. * * *

Baity v. Cranfill.

The whole subject is one of legislative regulation, and the act to confirm this marriage, though contracted within the prohibited degree, disposed of all legal objection to its validity."

The power to annul marriages is in this State withdrawn from the general assembly and committed exclusively to the courts, but in the absence of such constitutional provision, the reasoning is equally applicable to the law of this State.

A similar decision was rendered in the Supreme Court of Maryland and an act validating a marriage between uncle and niece declared constitutional. *Harrison v. State*, 22 Md. 468. And so we have sustained legislation which retrospectively gave sanction and validity to the marriage of slaves at a period when they were incapable of entering into such contract. Acts 1866, chap. 40, § 5.

This legalizing effect was given to the relation where the cohabitation continued after emancipation from its origin, and directions are given to make this a matter of record. Code, § 1842.

The validity of the statute in creating retrospectively a legal marriage relation between slaves is upheld in *Cooke v. Cooke*, Phil. 583; *State v. Harris*, 63 N. C. 1; *State v. Adams*, 65 id. 537; *State v. Whitford*, 86 id. 636; *Long v. Barnes*, 87 id. 329.

In *Cooke v. Cooke*, *supra*, the extent of and the limits to the exercise of such legislative power are thus stated by the late chief justice: "If the marriage be a nullity for the want of the essence of the matter, that is the consent of one of the parties as in the case of *Crump v. Morgan*, 3 Ired. Eq. 91; 40 Am. Dec. 447, where one of the parties being lunatic the court decreed a divorce of nullity of marriage, neither a convention nor legislature nor any other authority has power to make the marriage valid; but if the marriage be invalid by reason of the non-observance of some solemnity which is required by statute, as the presence of a minister of the gospel, or a justice of the peace, that want of form may be supplied by an ordinance of the convention."

In the latter category may be placed the obstacle of near relationship interposed by the statute.

So in *State v. Adams*, BOYDEN, J., declares the effect of the act to be to all intents and purposes to render the parties, thus cohabiting, man and wife, and to devolve upon each the duties and responsibilities of the married state.

The legislation in reference to the marital relations formed be-

Baity v. Cranfill.

tween slaves, by their consent to live together as man and wife, is not in this feature distinguishable from that now under consideration. A mere contract between persons of different sexes, followed by cohabitation, does not constitute marriage in a legal sense between slaves as it does not between free persons.

“A slave being property,” says PEARSON, C. J., “has not the legal capacity to make a contract, and is not entitled to the rights or subjected to the liabilities incident thereto. He is amenable to the criminal law, and his person (to a certain extent) and his life are protected * * * Marriage is based upon contract, consequently the relation of man and wife cannot exist among slaves.”

Hence the efficacy of the enactment was to convert an illicit into a legal relation with the consent of the freedman, and on the conditions specified in the act, whereby the status of husband and wife was acquired with such incidents, aside from criminal liability, as as would attach to a marriage valid from the incipency of cohabitation.

The act of 1879 does not however go so far. It does not render the connection legitimate from the beginning, making valid that which was before void. It simply limits the time in which legal proceedings may be instituted to annul the marriage, or in which its nullity may be adjudged collaterally in a pending case, and this action must take place during the lives of both, or where issue is born, it cannot take place at all. Death under such circumstances gives legal sanction to that which had been forbidden, and places the validity of the marriage contract beyond further question, except for the causes upon which the statute does not operate. What reasonable objection can be made to a law thus operating upon a marriage relation formed *de facto*. and not authorized because of a mere disabling statutory interdict, where the parties themselves have assented to and recognized the relation?

The proviso is broad and comprehensive in its declaration that under such circumstances after death, “no marriage followed by cohabitation, and the birth of issue (subject to the exceptions) shall be declared void,” that is, adjudged void in any legal proceeding.

There could be no direct proceeding for a sentence of nullity except during life, for such sentence affects the personal status or condition of parties, and no one can represent either when dead. The meaning is that such marriage must then stand with all its legal consequences, and its validity no longer open to controversy,

Clark v. Wilmington and Weldon Railroad Company.

and such legislation is in our opinion free from complaint as to its validity.

This view disposes of the appeal and renders it unnecessary to pass upon other matters presented in the argument. There is error in the ruling of the court upon the exception and in dismissing the action. This will be certified for further proceedings in the court below according to law as declared in this opinion.

Error.

Reversed.

CLARK V. WILMINGTON AND WELDON RAILROAD COMPANY.

(91 N. C. 503.)

Railroad — ejection for non-payment of fare.

The plaintiff took passage on the defendant's railway for a station four miles distant. He depended on a friend taking passage at the same time to pay his fare, but that person got into another car. When the conductor demanded his ticket he told him he had neither ticket nor money, but would go into the other car and get the money from his friend. The train was midway between the stations. The conductor refused to delay, and put him off. *Held*, that he could recover damages.

ACTION for ejection from railway train. The opinion states the case. The plaintiff had judgment below.

Mullen & Moore, for plaintiff.

Day & Zollicoffer, for defendant.

SMITH, C. J. The plaintiff, while at Whitaker's station, on the defendants road, awaiting the arrival of the train, on which he intended to take passage for Battleboro, a station four miles distant, and being himself without money, made arrangements with two others, Isaac Powell and T. P. Braswell, who were also going on the same train, in which each agreed to pay his fare of twenty-five cents, the charge between those points.

When the train came, all three, with twenty or more others, entered it, the plaintiff taking a seat in the forward coach, Braswell in that next behind, and Powell in that where the plaintiff was, or one next in front.

Clark v. Wilmington and Weldon Railroad Company.

When the conductor was passing through the coaches, taking up the tickets and collecting fares, from front to rear of the train, he came to the plaintiff, who said he had neither ticket nor money, but would get the fare, if allowed to go to the coach behind, from a gentleman sitting there.

The conductor refused to do so, saying, "you must get off. I have not time to wait for you. I have something else to do." The train was then about half way between the stations, moving at a rapid rate, when the conductor stopped the train and compelled the plaintiff to get out.

Braswell would have advanced the money and paid the fare upon application. As the plaintiff descended from the coach and was on the lowest step, Powell offered to pay the fare, but the conductor declined to receive it, saying, "you are too late, go and attend to your own business."

In expelling the plaintiff there was no actual force employed against his person, but the order was given, and assistants were present to execute it, and the plaintiff submitted.

The action is to recover damages for this ejectment of the plaintiff, and the sole question raised by the appeal is, whether under the circumstances the conductor had a right to put the plaintiff off the train.

An instruction was requested for the defendant, in the charge given to the jury, in these words: "When the conductor demanded of the plaintiff his ticket, and he tendered neither ticket nor money, the conductor had the right to eject the plaintiff."

This was refused, and instead the jury were directed as follows: "The conductor was not bound to go into the other car to get the fare from Braswell, but if Braswell had money and was ready and willing to pay the fare of the plaintiff, and plaintiff told him before he stopped the train and started to eject him that a friend in the next car would pay his fare, then the conductor ought to have allowed plaintiff a reasonable time to get the fare."

The whole controversy is involved in these two instructions, the one refused and the other given.

There can be no question of the right of the officer, in charge of a train of passenger coaches, to remove any one who has entered and refused to pay his fare or produce his ticket, as evidence of its having been paid to some authorized agent of the company, unless he is travelling with its permission without.

Clark v. Wilmington and Weldon Railroad Company.

Such refusal, in opposition to the rules of the company, presents a case which warrants the officer in charge to require such intruder to leave the train, and if necessary, to use such force as is sufficient to accomplish his ejection. Nor when the officer has stopped the train, and he is descending the steps and about to pass out, will a tender of the fare entitle him to return to his seat. He forfeits his right of carriage by such misconduct by breaking his own contract to pay when called on, and it is not regained by his repentance at the last moment, and after he has caused the inconvenience and delay to the company by his wrongful act. The adjudications fully recognize this authority in the carrier, and it is necessary to prevent imposition upon it. Ang. Carr., § 609, note A; Thomp. Carr. Pass. 340, note 5.

Where there has been no refusal to pay the fare and the obligation is not disputed, but some reason, such as the mislaying of the ticket or loss of pocketbook in which the money is kept, or other adequate cause prevents a prompt response to the conductor's demand, it is but reasonable that an opportunity should be allowed the passenger to search for what is mislaid or lost or to provide other means of payment, where the delay does not interfere with the regular duties of the officer in charge.

The delay in the present case would have been momentary if indeed any had been occasioned in permitting the plaintiff to precede the conductor in passing into the next coach and getting the money in time for the call on Braswell or before Braswell had been reached. Instead of complying with this request made in good faith, the conductor arbitrarily and instantly rang the bell and expelled the plaintiff, producing an interruption in the movement of the train that would have been rendered unnecessary if a brief time had been given to the plaintiff to get the money promised him.

This was a harsh exercise of power, injurious to the plaintiff and needless in the protection of the interests of the company.

The cases that uphold the right of the carrier company summarily to expel from its train a passenger who does not produce his ticket, or pay when called on as required by its regulations, are all, so far as we have examined, cases of a denial of the right to demand the fare, or a refusal to pay it upon some untenable ground, so that the conductor must submit or enforce his authority against the resisting passenger and prevent his riding unless he does pay.

The facts of this case do not bring it under the operation of the

Clark v. Wilmington and Weldon Railroad Company.

rule applicable to those who persistently and wrongfully resist the demand of the conductor, acting under directions of his principal, and within the sphere of his necessary powers, for the plaintiff acquiesced in the demand of his fare and merely proposed to pass into an adjoining car to obtain the money promised under a previous arrangement with a fellow passenger.

This view of the relations between the carrier and passenger is sustained by recent decisions.

In *Maples v. N. Y. and N. H. R. Co.*, 38 Conn. 557; s. c., 9 Am. Rep. 434, the plaintiff had mislaid his commutation ticket and could not at the moment when called on by the conductor produce it, as he was by the regulations of the company and the conditions of the issue of such ticket required to do, while the conductor knew he had one and that the time limited therein had not expired. The conductor, regardless of the explanation and following the letter of his instruction, demanded the fare, and it not being paid forced the plaintiff to leave the train. For this expulsion the plaintiff sued, and PARK, J., delivering the opinion in the Supreme Court, thus declares the law:

“The plaintiff was entitled to a reasonable time to find it (the ticket). The contract requires him to show his ticket to the conductor, but he was not bound to do so immediately when required. * * * Under such circumstances the plaintiff was entitled to ride as long as there was any reasonable expectation of finding it during the trip.”

In *Hayes v. N. Y. Cent. Railroad Co.*, decided in the Supreme Court at the General Term held in October last, reported in 30 Alb. L. J. 469, the plaintiff had a ticket but failed to find and exhibit it to the conductor when called on; whereupon the bell was rung, the train stopped, and the plaintiff required to leave. Before the train came to a halt the plaintiff found his ticket and offered it to the conductor who nevertheless compelled him to get off. The court say, MERWIN, J., speaking for all the members: “If the ticket of the plaintiff was mislaid, and he in good faith was trying to find it, he was entitled to reasonable time to enable him to do so, if he could, and if in case of failure to find it after such reasonable opportunity he was willing and ready to pay his fare, the conductor had no right to put him off.” See *Railroad v. Garrett*, 8 Lea, 438; s. c., 41 Am. Rep. 640.

It is contended however that the short distance to be run over by

Clark v. Wilmington and Weldon Railroad Company.

the train before reaching the station at which the plaintiff was to debark did not admit of delay and rendered necessary prompt action on the part of the conductor, and it was the plaintiff's own fault to enter the coach without a ticket or the means of payment when the fare was required of him.

It does not appear in the case that prepayment of fare was necessary, and it is obvious that no appreciable time would have been lost in giving the plaintiff opportunity to call on Braswell and get the money to pay his fare. If this were a mere pretense, and such seems to have been the assumption on which this precipitate action of the officer was taken, a moment would have revealed it, and then the ejection would have been fully warranted.

The defense set up is an assertion of the right to remove from a train any passenger, who may not be ready at once to exhibit a ticket or pay his fare, notwithstanding he has the means at command by passing into an adjoining coach, and only asks time to do so. This rigid rule enforced would require every one to have possession of his own ticket, or the friend who has it to be near by, at the hazard of expulsion, if he did not.

In all cases a reasonable indulgence should be shown a passenger in his effort to comply with the rules of the company, and what is reasonable must be determined in connection with surrounding circumstances and in view of the facts of each case.

We think the plaintiff's request was reasonable, and that the hasty and precipitate action of the conductor was in excess of the authority with which the law armed him.

The exceptions to the evidence are not tenable, for its only office was to show that the plaintiff had provided means to pay his fare, and did not intend to trespass upon the rights of the company.

In some of the States the right to eject for non-payment is restricted, so far as to require it to be at some station and not capriciously at any point, which might be at some very inhospitable spot endangering health, if not life.

There is no error and the judgment must be affirmed.

Judgment affirmed.

MERRIMON, J., dissenting.

State v. Partlow.

STATE V. PARTLOW.

(91 N. C. 530.)

Statute — ambiguity

A statute prohibited the sale of spirituous liquors within three miles of Mount Zion church in Gaston county. There were two churches of that name in that county. *Held*, inoperative.

CONVICTION of unlawfully selling intoxicating liquor. The opinion states the case.

Attorney-General, for State.

Hoke & Hoke, for defendant.

MERRIMON, J. The act of 1881, chap. 234, prohibits the sale of spirituous liquors within designated distances from many churches and other places named therein. So much of it as is material to this case provides, "that the sale of spirituous liquors shall be prohibited within three miles of * * * Mount Zion church in Gaston county."

It appeared on the trial that there were two churches bearing the name of "Mount Zion" in Gaston county, and there is nothing in the statute indicating to which of them it applies.

It is plainly the duty of the court to so construe a statute, ambiguous in its meaning, as to give effect to the legislative intent, if this be practicable. Its meaning in respect to what it has reference to and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. But the meaning must be ascertained from the statute itself, and the means and signs to which, as appears upon its face, it has reference. It cannot be proved by a member of the legislature or other person, whether interested in its enactment or not. A statute is an act of the legislature as an organized body. It expresses the collective will of that body, and no single member

State v. Partlow.

of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs indicated above. Otherwise each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent. *State v. Boon*, Taylor, 103; *Drake v. Drake*, 4 Dev. 110; *Adams v. Turrentine*, 8 Ired. 147; *State v. Melton*, Busb. 49; *Blue v. McDuffie*, id. 131; Potter's Dwarries Statutes, 179 *et seq.*

But a statute must be capable of construction and interpretation; otherwise it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning; but if after such effort it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply, to make one. The court may not allow "conjectural interpretation to usurp the place of judicial exposition." There must be a competent and efficient expression of the legislative will. In *Drake v. Drake*, *supra*, Chief Justice RUFFIN said: "Whether a statute be a public or private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."

When the statute intends to refer to and embrace within its provisions one or more of a multitude of things of the same kind, or one or more persons of many of the same name, it must do so in some way or manner, in terms, or by reasonable implication, or appropriate descriptive words, to designate what things or persons are intended by it. Else how can the court or a ministerial officer decide what things or persons are meant? A member of the legislature might say one thing or person was meant; another might say another thing or person was meant; a third might say yet another thing or person was meant; and thus the legislative will might entirely fail. The statute must speak. The legislative expression of its purpose and will must prevail; and if this does

State v. Partlow.

not appear with such a degree of certainty as that the court can learn what it is, the statute cannot operate.

Now the clause of the statute before us simply refers to "Mount Zion church in Gaston county," and there are two churches of that name in that county. There is nothing in the statute that in the remotest degree indicates to which of the two it refers. There are no means or signs of any kind appearing in it, in terms, by implication, by reference, or by any possible construction, that go to point to one of the two churches any more than to the other. It must therefore be as inoperative as if there was no church, or fifty churches of the same name in that county.

The testimony of the witness, who was a senator at the time the statute was enacted, was wholly incompetent for the reasons already stated.

We are constrained to declare that the clause of the statute under consideration is, because of its ambiguity, inoperative and void.

There is error, for which the judgment of the Superior Court must be reversed, and further proceedings had according to law. Let this be certified.

Error.

Reversed.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

PARKS V. NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY.

(13 Lea, 1.)

Statute — construction — penalty.

A statute provides a penalty against any railroad company for failure during any trip to announce the stopping places. *Held*, that only one penalty can be recovered up to the time of suit.*

ACTION for penalties. The opinion states the case. The plaintiff had judgment below.

Matt. Neil, W. C. Caldwell and Jo. R. Hawkins, Jr., for Parks.

A. W. Campbell, for railroad company.

COOPER, J. Action for the recovery of penalties under a statute. The Circuit judge sustained the demurrer to the declaration. The referees report that the judgment should be reversed upon the ground that the plaintiff is entitled to recover in full as claimed. The exceptions open the case.

The act of 1865, chap. 15, section 2 (Rev. Code, § 4927 b), provides as follows: "It shall be the duty of each conductor or other employee on any railroad in this State to announce in loud, distinct

* See *Cent. R. of N. J. v. Green* (86 Penn. St. 427), 27 Am. Rep. 718.

Parks v. Nashville, Chattanooga and St. Louis Railway.

words, for each passenger car, the stopping place, station, depot or town at which each car or passenger train stops, or shall be detained for any purpose, and also the time such car, or passenger train will stop or be detained."

The next section is: "Every railroad company shall cause such passenger car to be well supplied with pure and wholesome water, and in cool weather have each passenger car provided with comfortable fires, and at night furnished with sufficient light for the use, comfort and convenience of the passengers."

The next section is: "Upon failure of any railroad company, during any trip of the passenger cars, to comply strictly with any of the provisions of the preceding sections of this act, then such railroad company shall forfeit and pay the sum of one hundred dollars, recoverable before any court having jurisdiction thereof, one-half to be paid to the person suing, and the other half to go to the common school fund of the State."

The action was brought by George N. Parks against the Nashville, Chattanooga and St. Louis railway to recover penalties alleged to have been incurred under the foregoing act, for the failure of the conductor or other employee of the company to announce, on its passenger trains, at the Paducah junction, a stopping place of such trains, the station and the time the train would stop or be detained. The declaration contained 240 counts, each for a separate penalty for a distinct failure of duty. The defendant demurred to the declaration, assigning as causes of demurrer, first, that the penalty sued for was unconstitutional, and secondly, that the individual conductor or employee, upon whom the duty of performance was imposed by law, could alone be held responsible for the penalty, a corporation aggregate being incapable of incurring the penalty; or being sued therefor.

Although the first section of the statute quoted above imposes the duty specified by it upon the "conductor or other employee," while the next section imposes the duties specified therein upon the railroad company, yet the intention of the legislature was to require certain acts to be done for the comfort and accommodation of passengers on railroad trains, and to secure their performance by a penalty for the failure, to be sued for by any person aggrieved, certainly, and perhaps by a common informer. The regulations prescribed are within the police power of the legislature, and the mode adopted for their enforcement is one well known to the common

Parks v. Nashville, Chattanooga and St. Louis Railway.

law, and frequently occurring in our statutes. It is true, the penalty is usually imposed upon the person who is required to perform the duty, and whose delinquency gives the right of action. Corporations aggregate can only act through agents, and can only be subjected to the police power of the State in this mode by being made responsible for the default of their servants. Perhaps there can be no reasonable doubt of the liability of a corporation or superior in such cases, where the legislation is remedial, not punitive, although the subject is left in much obscurity by the authorities. The case before us may be decided upon well recognized principles.

All the authorities agree that statutes like the one under consideration must be construed strictly. They further agree that a master or principal may be made liable for a reasonable penalty for the act or omission of an employee or agent in the line of his duty, where the penalty is remedial, not punitive. The inclination of the courts is therefore to construe such statutes as remedial, that is, as intended to redress an actual injury with a view to prevent its recurrence, and not as punitive, that is, as intended to punish whether the injury has accrued or not. It is in the latter class of cases that the gravest doubts have been entertained whether the principal could be made liable at all to a penalty for the act or omission of the agent or employee. *Dickenson v. Fletcher*, L. R., 9 O. P. 1; *McCoun v. New York Central Railroad Company*, 50 N. Y. 176.

The intent of the legislature in the statute before us was to secure certain benefits to passengers on the railroad trains. It was of course never intended that a penalty should be incurred if in fact there were no passengers on the train, or in a car of the train in which there was a default. And a failure to call a station at which no passenger intended to get off, or did in fact get off, could do no harm, and would be at most only a technical breach of the law. If the statute be construed literally, or as punitive, there would be a penalty even in such cases. Penalties would also be incurred by acts of inadvertence or omissions of negligence although no person was aggrieved thereby. And if each default gave a right of action, and might be sued upon at any time, the purpose of the legislature would be lost sight of, and the act be perverted and made punitive instead of remedial. The common law forbids the infliction of penalties or punishment more than once on the same

Parks v. Nashville, Chattanooga and St. Louis Railway.

offender although guilty of several distinct offenses. By that law, and it was so construed in this State, a conviction, judgment and execution for a felony not capital were a bar to all other indictments for felonies not capital committed previously. *Crenshaw v. State*, Mart. & Yerg. 123; 1 Bish. Cr. Law (6th ed.), § 1070. And the courts have been always opposed to the enforcement of penalties except to the extent necessary to secure the manifest object of their infliction. For this reason, as we have seen, they are agreed in construing penal statutes strictly.

The act before us gives the forfeiture upon the failure of any railroad company to comply with its provisions "during any trip of the passenger cars." Under the rules of construction, adopted by the courts, there would be only one penalty for each trip. The statute does not in so many words give the right of action to a common informer, and the argument is strongly persuasive, especially in view of the amount of the penalty, that the right of action is given only to a passenger aggrieved by the default. But if it be conceded that a *qui tam* action might be brought by any one, the statute does not say that there shall be a penalty for "each and every offense." In the absence of these words it seems to be settled that only one recovery can be had for acts or omissions in violation of the statute, prior to the commencement of the suit. 5 Wait Act. & Def. 164. The reason is that it is the action which will bring the default to the attention of the corporation or party, and secure a compliance with the law. And it is the performance of the duties imposed which inures to the benefit of the passengers on whose behalf the act was passed. A different construction would contravene the legislative intent, leave an opening for the perversion of the act, and make a statute punitive which was intended to be remedial.

Accordingly, under a statute giving a penalty against any person employing another to act as a pilot who has no license, it was held that there could be only one recovery against the defendant, although he had employed an unlicensed pilot for several ships. *Sturgis v. Spofford*, 45 N. Y. 446. The same ruling was made where a penalty of \$50 was given against any railroad company for taking more than a fixed rate of fare. *Fisher v. New York Central Railroad Company*, 46 N. Y. 644. "The omission from the statute of the words 'for each and every offense,' " say the court in that case, "shows clearly that the legislature did not intend to

Parks v. Nashville, Chattanooga and St. Louis Railway.

open the door to a practice adopted in a case originating in another part of the State, now under advisement in this court, of opening a book account of penalties accrued, and delaying suit for a year when such penalties amounted to between \$20,000 and \$30,000. A construction permitting this would defeat the intention of the legislature, which was to suppress the extortion by prompt prosecution, by enabling parties to forbear suing until the aggregate penalties amounted to a large sum, and induce others to do as one of the plaintiffs in one of the cases now in judgment was honest enough to testify he did; that was to abandon other business, and spend his time for a considerable period in riding back and forth from Tonawanda to Buffalo for the purpose of earning penalties."

The plaintiff in this suit has brought before us precisely the case presented to the court of errors and appeals of New York under a similar statute. The decision of that eminent tribunal commends itself to our judgment and sense of justice. To allow a person to open a book account of penalties at an insignificant way station, and run up a charge of \$24,000 for the failure of the conductor to announce the station, or the length of stay, of which no passenger has complained, would shock the conscience, pervert the intention of the legislature, and turn a remedial into a highly punitive statute. It would be a literal construction of the words of the statute which would recall the similar construction by a somewhat famous judicial tribunal of the middle ages of a law making it a capital offense to shed blood in the street, whereby an unfortunate leech was condemned to the gallows for bleeding his apoplectic patient on the sidewalk where he had dropped down. If the legislature had, in the act before us, in so many words authorized what the plaintiff has done without any notice to the company, it would be difficult to sustain the constitutionality of the statute. For the effect would be the imposition of an excessive fine. Const., art. 1, § 16. But the legislature had no such intention, and we shall not press the language used so as to do indirectly what could not perhaps have been done directly. The statute, both upon reason and authority, admits of a different construction. We are of opinion therefore that only one penalty can be recovered up to the bringing of the suit.

[Omitting minor point.]

The exceptions to the report of the referees will be sustained, the judgment of the court below reversed, and the cause remanded

State v. Gardner.

for a repleader with leave to the defendant to move to strike out all the counts of the declaration except one to be selected by the plaintiff, and with directions to the Circuit Court to proceed in accordance with this opinion by striking out the other counts. The defendant will pay the costs of this court.

Judgment affirmed.

FREEMAN, J., dissented.

STATE V. GARDNER.

(13 Lea, 194.)

Criminal law — lost indictment.

A lost indictment may be supplied by a copy, upon affidavits, independent of the recollection of the judge.*

It seems, the case is covered by the Code.

THE opinion states the case.

Lea, attorney-general, for State.

F. W. Moore, for Gardner.

FREEMAN, J. At March term, 1883, ten presentments were returned, found true bills, into the Circuit Court for Obion county, against the defendant, Gardner. *Capias* was issued on all these, and defendant arrested. In August after this the clerk's drawer was broken open, and the presentments all stolen and never recovered.

After this, in open court, the energetic district attorney-general of this district moved the court to supply the lost papers, and tendered the affidavit of the clerk, showing the loss and circumstances attending it, together with his own affidavit, showing the papers by him tendered to supply the loss were clearly the same as the papers stolen. This was shown by the fact that the presentments were printed forms; the same as then in his possession, and the facts as to dates, etc., necessary to be inserted in writing, were taken from the notes found in the grand jury book, together with

* See *Schultz v. State*, ante, 194.

State v. Gardner.

the memory of the officer, of the facts from information had by him at the time of drawing the papers from the witness on whose testimony they were found. There is no question but the proof of the identity of the matter of the papers was clearly made out.

His honor the Circuit judge refused to allow the papers supplied, basing his ruling upon the fact that from his own statement, found in the record, he had never read the presentments, and therefore could not himself say whether the papers tendered were correct.

The ruling of his honor is based on the early decision of this court. *State v. Harrison*, 10 Yerg. 542. That case is evidently the result of the technical views of our courts at that day, and the theory then prevalent, that all technical objections should be allowed to prevail in favor of the defendant in criminal cases. No such views now prevail, nor would they be in accord with the spirit in which the criminal law is now and should be administered. Judge TURLEY, in the above opinion, seems also to lay much stress on the danger to the lives and liberties of the citizen. He says: "To establish the principle that a judge might supply a lost indictment upon affidavits of others, independent of his own recollection, would, as we think, be exceedingly dangerous to the lives and liberty of the citizen." We are unable to appreciate at this day the force of this reasoning. When analyzed, it means simply that in a case like this, where the best evidence possible is furnished of the correctness of the supplied papers, it should not be done, because of failure to get the evidence of the judge who would be the party least likely ever to be able to furnish such evidence, who in this case (as it would be found practically in any case) had never read the indictment or presentment, and who by the duties of his place is never required or expected to do so. As to the danger to the citizen, that has no better support in reason. What forcible difference it can make to an innocent man whether the proof of his innocence be presented to a jury, upon an original or copy of a presentment, is to us unseen. If he be guilty, then he deserves to be convicted, no wrong is done him, and the law is vindicated. Happily such views have all passed away.

The plain principle of the common law and of sound reason should apply in a criminal case as well as in civil cases, that is when the papers are lost they shall be carefully and accurately supplied by satisfactory evidence of their loss and their contents.

While we have no doubt the law is as we have stated and the

papers were properly offered to be supplied in this case under the rules of the common law, we think a fair construction of the act of 1847-8, section 3907 of the Code would include this as well as civil causes. It is: "Any record, proceeding or paper filed in any action at law or equity if lost or mislaid unintentionally, or fraudulently made away with, may be supplied upon application under the orders of the court, by the best evidence the nature of the case will admit of." This may well be held to be a criminal action pending at law against defendant, under the definition of Bacon, who says actions are either criminal or civil — criminal are either where judgment of death, as appeals of death or robbery, or only to have a fine for the king or imprisonment. See Bacon Abr., vol. 1, 63.

A more liberal rule in fact might well be adopted in criminal cases like the present, where no other papers seem to have been stolen, because the grave suspicion must be indulged that in such a case the defendant has been the party guilty of the abstraction, or was in some way actively connected with it -- he the only party who has the slightest interest in the destruction of the papers. To hold that the papers could only be supplied from the memory of the judge is practically to hold that they could not be supplied at all, and thus hold out an inducement to the parties prosecuted to surreptitiously obtain and destroy the papers and thus avoid the penalty of the law. Still more, the higher the crime or the heavier the penalty likely to be incurred, the greater the temptation, and so the evil tendency of the view is still more intensified in criminal cases.

For these reasons we overrule the case in 10 Yerger, and hold the court erred in not permitting the papers supplied. The case will be remanded to be proceeded in under this opinion.

Reversed and remanded.

Jackson v. Nashville, Chattanooga and St. Louis Railway.

JACKSON V. NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY.

(13 Lea, 491.)

Damages — proximate cause.

The defendant left a train of cars standing entirely across a highway crossing near its station, and the plaintiff, desiring to reach the station, undertook to drive with a horse and cart at a point where there was no crossing and the track was raised above the ground, and he was thrown off by the jostling of the cart and injured. *Held*, that the injury was not the proximate result of the defendant's conduct.*

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

W. C. Donaldson, for Jackson.

Foster V. Brown and *W. D. Spears*, for railroad company.

COOPER, J. The Circuit judge sustained a demurrer to the declaration in this case and the referees report that his judgment should be reversed. The defendant excepts.

The action is brought to recover damages for injuries to the plaintiff's husband resulting in his death. The declaration avers that the defendant's branch road passes through the town of Victoria, in Marion county, having a depot on its south side for the accommodation of passengers and the receipt of their baggage and freight; that the business part of the town and the residence of plaintiff's husband were on the north side of the railroad; that there was only one public crossing or way over the railroad for reaching the depot from the north side which was made and provided by the defendant for the public to travel on and over; that on the evening before the injury to the plaintiff's husband resulting in his death, the defendant left a train of cars standing on their track across the way aforesaid, and although notified that evening by the deceased that he wished to cross the road the next morning, failed to remove the same; that on the next morning the plaintiff's husband drove his cart in which was the trunk of a traveller intending to take passage on the defendant's train that morning, along the public way across

* See *Ehrgott v. Mayor* (96 N. Y. 264), 48 Am. Rep. 622; note 47 id. 885.

Jackson v. Nashville, Chattanooga and St. Louis Railway.

the railroad to carry the trunk to the depot; that by reason of the obstruction of the way by the defendant's standing train plaintiff's husband was compelled, in order to reach the depot with his cart, to cross the railroad track where no crossing was made or provided by the company, and where the track was about twelve inches high from the ground to the top of the rail, and while so crossing he was, by the jostling and toppling of the cart, thrown under the wheels of the cart, receiving injuries from the effect of which he died.

The question raised by the defendant's demurrer to the declaration is whether the obstruction by the defendant of the cross-way, which is charged to have been "willfully, carelessly, wrongfully, unlawfully and negligently" done, was the proximate cause of the injury to the plaintiff's husband so as to render the defendant liable therefor in damages. The right of the public to the highway crossing for the purpose of travel is so far paramount to the right and convenience of the company for any other purpose than that of transit by its running trains, that the obstruction as stated in the declaration was clearly negligent and unlawful. *State v. Morris, etc., Railroad Company*, 25 N. J. L. 437. The defendant was therefore liable in damages to any person, having a right to cross its road at that point who was prevented from so doing by the obstruction. And the only question is whether the injury sued for was so far a proximate result of the obstruction as to render the defendant liable therefor because of the obstruction. The declaration does not aver or state any fact of negligence or wrong on the part of the defendant connecting it with the injury, except the creation of the obstruction to the public way by the standing train of cars.

A long series of judicial decisions has defined proximate or immediate and direct damages to be the ordinary and natural results of the negligence, such as are usual and might therefore have been expected; and this includes in the category of remote damages such as are the result of an accidental or unusual combination of circumstances which would not be reasonably anticipated, and over which the negligent party has no control. 2 Thomp. Neg. 1083, citing the authorities. A proximate cause is therefore a probable cause, and a remote cause an improbable cause. A wrong-doer, in other words, is answerable for all the ordinary and natural consequences of his wrong but no further. The difficulty is in applying the general rule to the facts of a particular case.

It is very clear that a railroad company would not be liable for

Jackson v. Nashville, Chattanooga and St. Louis Railway.

an injury to a person who undertook to drive a cart across its track at any other place than a regular crossing, and was thrown from the cart by its jolting over the rails. The track is the property of the railroad company, not intended to be crossed by other vehicles except at the ways provided for the purpose, and a third person who undertook to pass it elsewhere would be a mere trespasser. Such a person would act at his peril, the company being in no way responsible for any accident resulting from the attempt. The only possible ground to take this case out of the general rule is that the wrongful obstruction of the highway justified the plaintiff's husband in adopting an unlawful and dangerous route to reach the depot, and made the defendant liable for the consequences. And this is the position assumed by counsel, the argument being that the traveller has a right to reach his destination, and adopt the best mode which seems open to him, the question whether he was justified in so doing being one for the jury. But it is difficult to see how because one party has done an unlawful act, the other party can be justified in doing an equally unlawful act at the risk of the former. And the authorities are all in conflict with the contention. It seems to be well settled that if a traveller is compelled to leave the highway by reason of a defect therein rendering it impassable, and while so off the highway, and attempting with due care to pass the obstacle, receives an injury, he cannot recover damages of the town, although he could have done so if the injury had happened to him on the highway; for the negligence of the town is to be deemed a remote cause of the injury. 2 Thomp. Neg. 1092. It was so held when the traveller, going off the highway to shun an obstruction not otherwise passable, foundered in a pond. *Tisdale v. Norton*, 8 Metc. 388. And when a bridge having been washed away and not rebuilt, the traveller attempted to cross at a ford not in the dedicated highway, the river being swollen. *Hyde v. Jamaica*, 27 Vt. 443, 458. The mere fact that a bridge is impassable will not justify a traveller in attempting to ford the stream under circumstances of danger. Damages accruing from this source are not the proximate consequences of a failure to keep the bridge in repair. *Day v. Crossman*, 1 Hun, 570; 4 T. & C. 122; *Jackson v. Greene County*, 76 N. C. 282; *Farnum v. Concord*, 2 N. H. 392.

The exception to the report of the referees will be allowed, and the judgment of the Circuit Court, sustaining the demurrer to the declaration, affirmed.

Payne v. Western and Atlantic Railroad Company.

PAYNE V. WESTERN AND ATLANTIC RAILROAD COMPANY.

(18 Lea, 507.)

Action — lawful act maliciously done.

No action lies for the malicious posting of a notice by an employer forbidding his employees to trade with a person named therein.*

THE opinion states the case. The plaintiff had judgment below.

Elder & White, for Payne.

Cooke & Cooke, for railroad company.

INGERSOLL, Sp. J. The question in this case is as to the sufficiency of the declaration. The Circuit judge sustained the demurrer and dismissed the suit. The referees recommend reversal of the judgment. The suit is against a railroad company and its general agent, and the declaration of plaintiff is as follows:

“That on the 16th day of February, 1883, and for many years previous thereto and continually since, plaintiff has been engaged in business as a merchant in Chattanooga, Tennessee, and operating a store on Market street at and near the depot, car-shed, railroad track and yard of the defendant, the Western and Atlantic Railroad Company. Plaintiff has at all times sustained a good character; and by close attention to business, and honest and fair dealing plaintiff had, on the 16th of February, 1883, built up and fully established a large, extensive and profitable business; the defendant, the Western and Atlantic Railroad Company, is a large and wealthy corporation, operating and controlling a line of railroad leading from Chattanooga, Tennessee, to Atlanta, Georgia. That said corporation employs a very large number of hands both in and out of Chattanooga; there are also four other railroads coming into Chattanooga, all intimately associated with the defendant railroad company in business relations. Plaintiff's store is located nearly in the center of five railroad *termini* leading into the city. Plaintiff had built up and was enjoying, on the day and year aforesaid, a large, extensive and profitable business with the employees of all the

* See *Heywood v. Tillson* (75 Me. 225), 46 Am. Rep. 378; *Chelsey v. King* (74 Me. 164), 48 Am. Rep. 569.

Payne v. Western and Atlantic Railroad Company.

aforesaid railroads; especially was he selling many goods to and doing a large business with the agents and employees of the defendant railroad company, both in Chattanooga and along the line of said railroad; he had also built up a large trade along the line of said railroad, both buying and selling goods to persons living along the line of said road, other than employees. The defendant, J. C. Anderson, is the general agent of the defendant railroad company at Chattanooga, having in charge and controlling the employees in Chattanooga, Boyce station and elsewhere along the line of said railroad. And the said plaintiff further declares that, while so engaged in his legitimate and profitable business * * * * the said defendants wickedly, unlawfully, fraudulently and maliciously conspired and confederated together out of malice, ill-will and wicked feeling to break up, injure, damage and ruin plaintiff in his business, and to that end and for that purpose, they, the said defendants, on the day and year aforesaid, did make, publish and circulate the following scandalous and injurious order, threat, command and paper writing, to-wit:

February 16, 1883.

J. T. Robinson, Y. M.— Any employee of this company on Chattanooga payroll who trades with L. Payne from this date will be discharged. Notify all in your department.

J. C. ANDERSON, *Agent.*

The said J. T. Robinson is and was yard-master in the employ of the defendant railroad company, controlling and having under him a large number of hands. Like orders and commands were addressed and sent to other heads of departments of said railroad; and the same were posted and published by defendants and read and commented upon all along the line of said railroad among and by plaintiff's patrons and customers. Plaintiff further declares that by reason of said order and command, and other means used by defendants, he was brought into reproach, disrepute, suspicion and distrust, and his business broken up and ruined. The employees of the defendant railroad company, deterred and intimidated by the threat contained in said illegal command and order, quit trading with plaintiff because of the illegal and malicious interference, threats and combination of defendants, and his business far and near has been greatly damaged and ruined, to his damage," etc.

In the second count the plaintiff setting forth, as in the first, his lawful and lucrative business and good character and repute as a merchant, and the power, wealth and influence of the railroad.

Payne v. Western and Atlantic Railroad Company.

company and its employment of many persons who traded with him, but omitting any averment of Anderson's agency, complains that "the defendants unlawfully, wickedly, wantonly, maliciously and out of their malice toward him, the plaintiff, undertook by means of threats, insinuation, innuendoes, slander and other means to oppress, injure, damage and ruin plaintiff in his legitimate business and destroy his character; and by the means and for the purpose aforesaid, and with said wicked motive, did oppress, injure, damage and ruin plaintiff's business, character and reputation; that the said defendants threatened among other things, to discharge any of the employees of said railroad company who should trade with plaintiff, and this was published far and near by defendants, whereby not only said employees were deterred from trading with him, but he was brought into reproach, disrepute and suspicion, and lost his other trade and custom," etc.

The difference between the two counts is: First. In the first Anderson is described as the company's agent, and in the second he is not. Second. In the first the posted notice is set out *ipsis verbis*, while in the second its publication and purport are alleged in general terms.

The demurrer of defendants contains the following grounds of objection to the declaration:

First. Defendants had the right to discharge employees because they traded with plaintiff, or for any other cause.

Second. If they had no such right, the act was merely a breach of the contract of employment for which plaintiff had no right of action.

Third. Plaintiff had no vested right in the trade of defendants' employees; wherefore they had the right to prefer employment by defendants to trading with plaintiff and consequently to withdraw their trade from him, and he could not sue defendants therefor.

Fourth. The order complained of was not libellous in itself, nor is it made so by innuendo, nor is there any matter alleged which is actionable.

Fifth. The railroad company demurs because it could not be liable for the unauthorized, wrongful act of its agent, Anderson, not within the line of his duty.

Sixth. Anderson had a right to hire and discharge employees without direction from any one, and for any wrong done defendants would be liable only to the employees so discharged.

Payne v. Western and Atlantic Railroad Company

The only distinctive feature of the last ground of demurrer seems to be the assertion of Anderson's right to hire and discharge employees without direction from the railroad company, the latter part asserting the limitation of liability to the employee for wrong done being embraced in a former head of demurrer. The peculiar ground relied on in this head is obnoxious to the objection that it is a speaking demurrer, for in the second count of declaration it does not appear that Anderson was even the agent of the railroad company; and in the first, though the agency is alleged it does not appear that he possessed the extent of authority asserted for him in the demurrer. Wherein it is peculiar therefore this ground of demurrer is not well taken.

The fifth ground above set forth is untenable as to the second count because of the absence therefrom of any allegation of the agency of Anderson; and as to the first count, because first, instead of wanting in an averment of the authority of Anderson as agent of the company, it alleges expressly a combination and conspiracy between principal and agent to do this alleged wrong to plaintiff, and a participation by both in the act complained of; and second, corporations are liable for the tortious acts of its agents within the apparent scope of corporate powers, which are done in the interest of the corporation and in pursuance of any general or special authority. Cooley Torts, 119, 120.

The objection to the declaration as one for libel or slander is well taken. The published order set out in the first count not only contains no libellous statement, but it has in it no reference even, direct or indirect, to the character of plaintiff. There is no innuendo in the count and it is not easy to see what statements or references therein contained would support one, and this may explain its absence. Let it suffice that no libel or slander is made out directly or by imputation even in the count which sets out the writing. The second count bears no resemblance to a declaration in libel or slander. It sets out no writing or spoken words even, but merely contains a general charge that defendants undertook by means of "insinuations, innuendos, slander and other means to oppress, injure," etc. Malice is freely charged, and the charge is frequently repeated in both counts. But there is no suggestion even of any false statement written or spoken by defendants or either of them. Without this of course no action for libel or slander can be maintained; for no amount of malice will compen-

Payne v. Western and Atlantic Railroad Company.

sate for the absence of falsehood in the legal requirements of this kind of action. The suit is not maintainable therefore as an action of libel or slander, either to personal character or business reputation. It must stand, if at all, upon the alleged malicious and unlawful conspiracy and combination, and wicked conduct of defendants, for the purpose and with the effect to deprive plaintiff of his customers, and thus oppress, injure and ruin him in his trade.

This, rather than libel or slander, is the particular wrong and injury specially relied on by plaintiff. As concisely put in argument by his counsel: "We have brought a suit to recover damages because defendants, by threats and intimidations, prevented people from trading at our store."

The full scope of his argument is:

"The declaration sets up that plaintiff was pursuing a lawful business — that of a merchant; and that defendants, out of malice and ill-will toward him, entered into an unlawful confederation and conspiracy to break him up; and that pursuant to such unlawful purpose, by means of threats, force and intimidation, they drove his customers from him and succeeded in breaking up his business."

"Lawful competition is allowed, but not a conspiracy forcibly and by threats and intimidation to interfere with another's legitimate business."

"The good-will of a business is the subject of acquired right and can be bought and sold as other property."

"Defendants not only maliciously invaded and weakened plaintiff's legal right to the good-will in his business, but by their threats, intimidation and force destroyed this acquired right."

"He who invades, weakens or destroys a legal right maliciously, is liable in damages therefor."

"Every malicious act is wrongful of itself in the eye of the law; and if it cause damage or hurt to another, it is a tort, and may be made the foundation of an action."

"When a violent or malicious act is done to a man's occupation, profession or way of getting a livelihood, then an action lies in all cases."

"The defendants did do a malicious, injurious act to plaintiff's occupation, and hence they are liable."

To this forcible statement of plaintiff's case, defendant's answer in effect is: We have a right to employ or not employ, when and whom we choose. We may discharge our employees, all or singly, whenever we choose; with or without reason; because they trade

Payne v. Western and Atlantic Railroad Company.

with plaintiff or do not trade with him; and if the employees are injured or wronged thereby, they may sue; but plaintiff cannot. It is purely a matter of contract between the company and its employees; and if a contract has been broken only a party to the contract, or one in privity, can sue for its breach. Plaintiff shows no such privity, and therefore cannot maintain this action, unless defendant has done some unlawful act, which caused the injury complained of; the only act complained of is the notice to hands that they will be discharged if they trade with plaintiff. This being merely the exercise of an undoubted right by defendant, cannot give plaintiff a right of action, even though the act was maliciously done, and the plaintiff suffered injury therefrom; because malice does not furnish ground for civil action. Wrongful acts alone are actionable. And as to the conspiracy alleged, though it may be actionable, it does not become so until some wrongful act is done under it; and since the only act alleged here is not unlawful, but permissible to defendant, this action is not maintainable for conspiracy, for want of the wrongful act done under it; lacking this, the suit must fail, though there be a conspiracy and malice toward the plaintiff, and in consequence thereof, and of the lawful act of defendants thereunder, plaintiff lost his customers and profits, and so failed in his business.

Plaintiff in reply to this, besides asserting the correctness of his original position, denies that the defendants had the right to discharge or threaten to discharge employees for trading with him, because the concession of such authority and its exercise by strong corporations and large manufacturers would unfairly defeat and destroy competition, and tend to create monopoly in trade; whereas the law should discourage the latter and foster the former. Plaintiff also insists, that while our decisions furnish no precedent for his suit, and we have no statute whatever upon the subject, the cases cited by Mr. Addison in the first volume of his work on Torts, chapter 1, section 1, afford abundant authority for this action.

The novelty, interest and importance of the questions demand a careful examination of the cases and the principles involved. The case turns upon the common law. The first question is: Is it unlawful for one person, or a number of persons in conspiracy, to threaten to discharge employees if they trade with a certain merchant? Would it be unlawful to discharge them for such reason? If not, it surely would not be unlawful to "threaten" it.

Payne v. Western and Atlantic Railroad Company.

If the employees are engaged for fixed terms, it may be assumed that a discharge by the employer for such a reason would be unwarranted, and would give the employee an action for breach of contract. But no one else, except a privy, could complain of the breach of contract, and the ground of the employee's action would be the refusal of the employer to pay him for the period promised in the contract of service. If the service is terminable at the option of either party, it is plain no action would be even to the employee; for either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law. Much less could a stranger complain. No action could accrue either to employee or stranger for breach of contract; for no contract is broken. If the act is unlawful it must be on other grounds than breach of contract, as that it unjustly deprives plaintiff of customers and trade to which his fair dealing entitles him, and thus destroys his business.

For any one to do this without cause is censurable and unjust. But is it legally wrong? Is it unlawful? May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And if one of them, then why not all four? And if all four, why not a hundred or a thousand of them? The principle is not changed or affected by the number. And if it were, who should say how many it would be lawful and how many unlawful to forbid? Nor can it be better determined by effect than by number. To keep away one customer might not perceptibly affect the merchant's trade; deprived of a hundred of them, he might fail in business. On the contrary, my own dealings may be so important that if I cease to trade with him, he must close his doors. Shall my act in keeping away a hundred of my employees be unlawful, because it breaks up the merchant's business, and yet it be lawful for me to accomplish the same result by withholding my own custom?

Obviously the law can adopt and maintain no such standards for judging human conduct; and men must be left without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause, without thereby being guilty of an unlawful act *per se*. It is a right which an employee may exercise in the same way, to the same

Payne v. Western and Atlantic Railroad Company.

extent, for the same cause or want of cause as the employer. He may refuse to work for a man or company, that trades with any obnoxious person, or does other things which he dislikes. He may persuade his fellows, and the employer may lose all his hands and be compelled to close his doors; or he may yield to the demand and withdraw his custom or cease his dealings, and the obnoxious person be thus injured or wrecked in business. Can it be pretended that for this either of the injured parties has a right of action against the employees? Great loss may result, indeed has often resulted from such conduct; but loss alone gives no right of action. Great corporations, strong associations, and wealthy individuals may thus do great mischief and wrong; may make and break merchants at will; may crush out competition, and foster monopolies, and thus greatly injure individuals and the public; but power is inherent in size and strength and wealth; and the law cannot set bound to it, unless it is exercised illegally. Then it is restrained because of its illegality, not because of its quantity or quality. The great and rich and powerful are guaranteed the same liberty and privilege as the poor and weak. All may buy and sell when they choose; they may refuse to employ or dismiss whom they choose, without being thereby guilty of a legal wrong, though it may seriously injure and even ruin others.

Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers and farmers. All may dismiss their employees at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong. *A fortiori* they may "threaten" to discharge them without thereby doing an illegal act, *per se*. The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employees. The law cannot compel them to employ workmen, nor to keep them employed. If they break contracts with workmen they are answerable only to them; if in the act of discharging them they break no contract, then no one can sue for loss suffered thereby. Trade is free, so is employment. The law leaves employer and employee to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Either the employer or employee may terminate the relation at will, and the law will not interfere, except for contract

Payne v. Western and Atlantic Railroad Company.

broken. This secures to all civil and industrial liberty. A contrary rule would lead to a judicial tyranny as arbitrary, irresponsible and intolerable as that exercised by Scroggs and Jeffreys.

But plaintiff says that the defendants wickedly and maliciously combined and confederated for the unlawful purpose of causing plaintiff's customers, by means of threats and intimidation, to leave off trading with him; and that the unlawful purpose was accomplished by these means, and thus plaintiff's business was ruined and he caused to suffer great pecuniary loss; and he urges that defendants are liable in damages therefor, because every act done fraudulently or maliciously, and for the purpose and with the effect of injuring another in his lawful business gives good cause of action; and so the referees have reported; and therefore they recommend the reversal of the judgment sustaining the demurrer.

If defendants, by means of "threats and intimidation," have driven away plaintiff's customers and thus destroyed his trade, they have injured him by an unlawful act, and are liable to him in damages whether they did it wickedly and maliciously or not. For it is unlawful to threaten and intimidate one's customers; and the loss of trade is the natural and proximate result of such acts. But "threats and intimidations" must be taken in their legal sense. In law a threat is a declaration of an intention or determination to injure another by the commission of some unlawful act; and an intimidation is the act of making one timid or fearful by such declaration. If the act intended to be done is not unlawful, then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense. So too of the alleged conspiracy. A conspiracy is an agreement between two or more persons to do an unlawful act. If the act to be done is not unlawful then the agreement or combination is not a conspiracy. The question then is, what were the acts done, or intended or agreed to be done, by which the trading was prevented?

In the second count, which plaintiff specially relies on to sustain this view of his case, after charging generally the use of threats and intimidation, he specifies as follows: "The said defendants threatened among other things to discharge any man in the employ of said railroad company who should trade with plaintiff, and this threat was published," etc. This is the only "threat or intimidation" specified. But this act was not unlawful as we have seen, and to denounce a determination to do it and thus deter customers

Payne v. Western and Atlantic Railroad Company.

from trading with plaintiff, was not "threat or intimidation" in a legal sense. From this it is fairly inferable that in this count as in the first, plaintiff, though he uses the general terms "unlawful and malicious threats," refers only to the so-called "threat" to discharge employees, and rests his case upon it. Presumably he has particularized the most wrongful act, or at the most the other "unlawful and malicious acts" are of the same, and no worse character than that specified. This act, he says, was done by the defendants wickedly and maliciously with the intent and effect of breaking up his business.

The question then is, is an act not unlawful rendered actionable to the one suffering injury therefrom, because it is committed willfully, wickedly and maliciously, and in pursuance of a conspiracy to do the injury suffered? Does one render himself liable in damages for maliciously and wickedly exercising his rights or denouncing his intention of so doing, if thereby he injures another?

The cases relied on by plaintiff, cited by Mr. Addison in his work on Torts, sections 20, 22, where tenants were driven away from holdings, scholars frightened from school, persons prevented from trading at one's store or with his vessel, buyers and workmen driven from a quarry, do not serve as precedents, for the reason that in all of them the defendants either committed or threatened unlawful acts. In most of them violence was used or menaced; in some, statutory misdemeanors were committed, in others fraud, duress or libel was resorted to. This relieved the cases of the difficulty or doubt which exists in this, where there is no libel, violence or broken statute. In section 40 however it is declared broadly, that "every malicious act is wrongful in itself in the eye of the law, and if it causes hurt or damage to another it is a tort, and may be made the foundation of an action." Upon this plaintiff relies, and upon it the referees have based their report; and if this broad statement contains a correct exposition of the law, they are right, and the demurrer should be overruled; for the declaration abounds in charges of malice and wrong. But is this the law?

To answer this correctly it must first be understood what is meant by "malicious act." In common parlance it is an act proceeding from hatred or ill-will, or dictated by malice, or done with wicked or mischievous intentions or motives. But surely this cannot be the sense in which the phrase is employed by Addison; for if it were, then my neighbor would be liable to me, if from ill-will

Payne v. Western and Atlantic Railroad Company.

or wicked motive he refused to let me get water at his spring; or to make a road for myself across his farm, or locked his pump or his gate against me, or built a fence on his own land across my path; or built his store or shop or a high fence on his own land in such close proximity to my windows as to exclude light and view; or digged on his lot below the foundation of my house so as to endanger it. It is unreasonable that actions should be maintained for any of these things. For though my neighbor is causing me hurt, and that too from wicked motives, and is thus violating the moral law, he is only exercising his undoubted right to use his own for himself and deny me all privilege in it; and this the law does not punish as has been often ruled in courts of the highest character. *Story v. Odin*, 12 Mass. 157; *Mahan v. Brown*, 13 Wend. 261; *Auburn and Cato Railroad Company v. Douglass*, 9 N. Y. 447; *Lasala v. Holbrook*, 4 Paige, 169; *Thurston v. Hancock*, 12 Mass. 220.

Judge Cooley, in his work on Torts, page 278, says: "It is a part of every man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern." And again on page 688: "The exercise by one of his legal right cannot be a legal wrong to another. * * * Whatever one has a right to do another can have no right to complain of." This he considers a mere truism.

Baron PARKE said in *Stevenson v. Newnham*, 13 C. B. 285: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." And Judge BLACK, in *Jenkins v. Fowler*, 24 Penn. St. 308, declares: "Any transaction which would be lawful and proper, if the parties were friends, cannot be made the foundation of action merely because they happened to be enemies. As long as a man keeps himself within the law by doing no act which violates it we must leave his motives to Him who searches the heart." Judge COOPER, in accordance with these views, has declared in *Macey v. Childress*, 2 Tenn. Ch. 442: "It is no defense to a legal demand instituted in the mode prescribed by law that the plaintiff is actuated by improper motives. The motive of a suitor cannot be inquired into. Were it otherwise nearly every suit would degenerate into a wrangle over motives and feelings." The question was ably argued and received elaborate consideration in the Supreme Court of Maine in the recent case of

Payne v. Western and Atlantic Railroad Company.

Heywood v. Tillson, 75 Me. 225; s. c., 46 Am. Rep. 373; wherein it was decided without dissent that no action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house and thus prevents the renting. Indeed the contrary ruling would lead to evils innumerable. It would be unendurable that our courts of law should be perverted to the trial of the motives of men who confessedly had done no unlawful act. It is suggestive of the days of "constructive treason."

Upon both reason and authority it seems obvious therefore that the phrase "malicious act" cannot be used by Mr. Addison in this connection in the popular signification as understood and applied by the referees in this case; or if so used by him it is not a correct statement of the law.

In another sense it is correct. Prof. Greenleaf in his second volume on Evidence, section 453 (2), thus defines a malicious act: "In a legal sense any unlawful act, done willfully and purposely to the injury of another is as against that person, malicious." To determine then whether a "malicious act" is "wrongful," in the legal sense and therefore actionable, we must first determine whether it is unlawful. But if unlawful and injurious it is actionable, irrespective of the motive; and whether malicious or not, if not unlawful and injurious, then it is not actionable even though malicious and wicked.

Plaintiff appeals with confidence to the legal maxim: There is no wrong without its remedy. Far be it from us to shake the public and professional confidence in this venerable maxim of the English common law. Its influence has long been and will long continue most wholesome in preventing the private redress of real and imaginary wrongs. But as it is a legal maxim it must be taken in a legal sense. So taken it can obviously mean no more than that there is a legal remedy for every legal wrong, *i. e.*, every injury suffered as the consequence of an unlawful act or a lawful act done in an unlawful manner. Neither is shown here. Defendants have merely warned their employees not to trade with plaintiff; if they do they must give up their employment. They had the right to discharge them on this ground; it was not unlawful, but highly proper therefore to give them warning of their intention. The manner of giving the warning was not unlawful or even censurable. The posted notice contained no word of slander, libel or reproach upon the character of

Payne v. Western and Atlantic Railroad Company.

plaintiff; no charge or insinuation that he was dishonest or unfair in his dealing. Omitting any attack on plaintiff's character as a man or trader, defendants, in the usual manner, and in a few harmless words, told its employees to stop trading with him or they must stop working for them. The common law does not forbid such an act, nor has our legislature yet endeavored to make such an act unlawful by statute, as has been done in some of the States, and probably in England. No legal wrong has been done; therefore there is no legal remedy. For the moral wrong of the act, if there be any, defendants may be called to account in another tribunal. Courts administering the civil law cannot punish sin or wickedness unless it be committed in violation of the civil law, which is the measure of their jurisdiction.

Nor will the maxim "*sic utere tuo, ut alienum non lædas*" aid the plaintiff in his contention. As commonly translated, "So use your own as not to injure another's," it is doubtless an orthodox moral precept; and in the law too it finds frequent application to the use of surface and running water, and indeed generally to easements and servitudes. But strictly even then it can mean only: "So use your own that you do no legal damage to another's." Legal damage, actionable injury, results only from an unlawful act. This maxim also assumes, that the injury results from an unlawful act, and paraphrased means no more than: "Thou shalt not interfere with the legal rights of another by the commission of an unlawful act," or "Injury from an unlawful act is actionable." This affords no aid in this case in determining whether the act complained of is actionable, that is, unlawful. It amounts to no more than the truism: An unlawful act is unlawful. This is a mere begging of the question; it assumes the very point in controversy, and cannot be taken as a *ratio decidendi*.

A majority of the court therefore conclude that the act done, i. e., the publication of the notice that the company would discharge employees who traded with plaintiff, was not an unlawful threat nor an unlawful act; was not a libel; and though done wickedly and maliciously, and in pursuance of a wicked design, is still not actionable, because it was not an unlawful act, nor an act done in an unlawful manner.

The report of the referees will therefore be set aside, and the judgment of the Circuit Court affirmed.

FREEMAN and TURNER, JJ., dissented.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

HICKS v. LOVELL.

(64 Cal. 14.)

Vendor and purchaser — ejectment.

Ejectment will lie against one in possession of land under a contract of purchase, who refuses fully to perform on his part.*

EJECTMENT. The head-note states the point. The plaintiff had judgment below.

M. A. Luce and Will M. Smith, for appellant.

Leach & Parker, for respondent.

McKee, J. [Omitting statements.] By consent, the issues in the action at law and in the cross-action in equity were tried together. At the trial the plaintiff rested his case upon proof which established a legal title in himself to the lands in dispute, possession by the defendant at the commencement of the action, and an absolute refusal by the defendant to comply with the terms and conditions of the agreements of purchase, under which he was

* See *Ticymen v. Hawley* (24 Gratt. 512), 18 Am. Rep. 661; *Harris v. Prink* (49 N. Y. 24), 10 Am. Rep. 818.

Hicks v. Lovell.

in possession, or to quit and surrender possession to the plaintiff. When the plaintiff rested the defendant moved for nonsuit, upon the ground that the proofs and the pleadings in the case showed that the defendant was in possession under contracts of purchase which had been in part performed. The motion was denied, and that ruling is also assigned as error.

But the ruling was correct, because the legal title to the lands being in the plaintiff, he was in law entitled to judgment, unless the agreements of purchase under which the defendant entered and was in possession gave him an equitable right to the possession, But according to the plaintiff's proofs, that right had ceased to exist, because the defendant had refused to comply with the terms and conditions of the agreements, and repudiated them. A vendee in possession of land cannot repudiate his contract of purchase and at the same time hold the possession under it and by virtue of it. A repudiated contract is no protection to an intending vendee in possession against the legal title. If the defendant denied repudiation and relied upon readiness and ability to perform, which was prevented by the plaintiff, or an offer to perform which was rejected, those were matters in defense to the action at law, or for the consideration of the court, sitting as a court in equity, in the equitable cross-action. *Clark v. Lockwood*, 21 Cal. 220; *Meador v. Parsons*, 19 id. 294; *Lestrade v. Barth*, id. 666; *Cadiz v. Majors*, 33 id. 288; *McCauley v. Fulton*, 44 id. 356; *Tormey v. True*, 45 id. 105; *Kenyon v. Quinn*, 41 id. 325.

Upon the trial the court found that defendant had never performed, or in good faith offered to perform, either of the agreements, according to their terms and conditions; that he had not been prevented from performance by any act of the plaintiff; that plaintiff had tendered a deed and demanded performance, but defendant had absolutely refused; and that both he and Wheeler had wholly failed and refused to perform the agreements or any part thereof, except to deliver to the plaintiff about 136 sacks of wheat, of the average weight of 135 pounds each, which the plaintiff received from them in the fall of 1880, and because of the delivery to the plaintiff of that quantity of wheat, in part performance of the agreements, and of the entry and possession by the defendant under the agreements, it is contended that ejectment is not maintainable by the plaintiff as vendor, against his vendee in possession, who has refused to comply with the terms and conditions of the agreements,

Hicks v. Lovell.

or to quit and surrender possession of the lands; and that his only remedy is in equity to foreclose his vendor's lien for the purchase-money. *Willis v. Wozencraft*, 22 Cal. 614, and *Bohall v. Diller*, 41 id. 532, are cited to sustain the contention. But neither of those cases is analogous to the case in hand, nor does either sustain the contention of the appellant. In *Willis v. Wozencraft*, the vendor and vendee had been in possession in common, each "having a 'full right' to an undivided half of the rents and profits." Being thus in possession, the vendee agreed to purchase the undivided interest of his co-tenant, who had the legal title to the entire estate in his name, and took from him a bond for a deed, upon payment, of the purchase-money, in which it was especially stipulated that the vendee had the right of possession to an undivided one-half of the premises. Against the vendee thus in possession in his own right, and under the contract of purchase, a grantee of the vendor brought ejectment, solely upon the ground that he had acquired the legal title to the land. But before suit she had made no demand to be let into possession of her share with the defendant, and there was no proof in the case of any special facts tending to show either an actual or constructive ouster of the plaintiff, nor was there any evidence tending to show the tender of a deed and demand and refusal to pay the purchase-money after it became due, or that the purchase-money had not been paid, or that the defendant had abandoned the purchase, or refused to complete it according to the terms of his contract. The defendant had therefore done nothing to forfeit the benefit of his contract; and being rightfully in possession under his equitable title, he could not be disturbed.

The defendant in *Bohall v. Diller*, has also entered into possession of the land in dispute under a contract of purchase. The purchase-money had become due and was unpaid at the commencement of the action, and relying solely upon that fact, the vendor, without having put the vendee in default, brought a peculiar action against the vendee, to recover damages for an alleged breach of the contract, possession of the land, and also the purchase-money. But the Supreme Court held that he could not recover damages, because he had not alleged any; nor the purchase-money, because although it had become due before the commencement of the suit, yet as there was no allegation of tender of a deed and of demand and refusal to pay, the defendant was not in fault; nor could he recover the land, because

there was no evidence tending to show that the contract had been rescinded by the parties; therefore the right of possession was in the defendant and must prevail.

The doctrine deducible from those cases, as well as from others in this State, is that ejectment is not maintainable by a vendor of real property against his vendee in possession under an executory contract of sale, who is not in default in the performance of his contract, or who has performed it and is in a position to demand a deed, or who seasonably and in good faith offers to comply with the terms of his purchase, and continues ready to comply with them. To a vendee in possession under such circumstances the contract will avail him as an equitable defense to an action of ejectment brought against him by his vendor, or as a cross-action in equity to enforce a trust against his vendor, or to obtain a specific performance of the contract. *Love v. Watkins*, 40 Cal. 548; *Gordes v. Moody*, 41 id. 336; *Talbert v. Singleton*, 42 id. 395; *Willis v. Wozencraft*, and *Bohall v. Diller*, *supra*; *C. P. R. Co. v. Mudd*, 59 Cal. 585. But if after maturity of the purchase-money the vendor tenders a deed, and demands payment, which the vendee refuses to make, or if the vendee has abandoned the purchase, and repudiates the title of his vendor, in such case the vendee forfeits the benefit of the contract, and he cannot avail himself of it as a defense to an action of ejectment by his vendor (*Pearis v. Covillaud*, 6 Cal. 617; *Whittier v. Stege*, 61 id. 239; *Thorne v. Hammond*, 46 id. 530); nor by way of a cross-action for specific performance. For it is well settled that a court of equity, in the exercise of its judicial discretion, will not decree specific performance of a contract for the sale of land in favor of a party, who by his own negligence or default, has prevented or unreasonably delayed the full execution of the contract. *Conrad v. Lindley*, 2 Cal. 173; *Brown v. Covillaud*, 6 id. 566; *Green v. Covillaud*, 10 id. 317; *Willard v. Tayloe*, 8 Wall. 557.

That was the position of the defendant on his cross-complaint. By his own showing he abandoned the purchase of one of the contracts, and disclaimed the title of his vendor; but having entered into possession under the title and in subordination to it, he was estopped from denying it. *Hoen v. Simmonds*, 1 Cal. 119; *Salmon v. Hoffman*, 2 id. 139; *Walker v. Sedgwick*, 8 id. 403. And as to the other contract, he neither averred a tender of the purchase-money nor offered to pay it. *Marshall v. Caldwell*, 41 Cal. 611;

Hicks v. Lovell.

Englander v. Rogers, id. 420. One who appeals to a court of equity to defend him against the legal title to land, of which he is in possession, must do equity by paying the price which he agreed to pay. The maxim, "he who seeks equity must do equity," applies to him in full force. *Eastman v. Plumer*, 46 N. H. 464. The cross-complaint of the defendant therefore lacked the essential element of a complaint in equity.

Nor had the defendant any equitable title which would serve as a defense to an action of ejectment. Having abandoned his purchase and repudiated his contracts, he was not a purchaser clothed with right, and his vendor was not bound to resort to a court of equity for relief; he may sue in ejectment. *Keller v. Lewis*, 53 Cal. 118.

"The refusal of one party to perform his contract," says the Court of Appeals of New York, in *Graves v. White*, 87 N. Y. 465, "amounts on his part to an abandonment of it. The other party therefore has a choice of remedies. He may stand upon his contract, refusing assent to his adversary's attempt to rescind it, and sue for a breach, or in a proper case for a specific performance; or he may assent to its abandonment, and so effect dissolution of the contract by the mutual and concurring assent of both parties. In that event he is simply restored to his original position, and can neither sue for a breach nor compel a specific performance, because the contract itself has been dissolved. * * * An absolute refusal, a deliberate repudiation of the stipulations of the contract gives to the other party as an alternative remedy the right to assent to such abandonment and treat the contract as dissolved." In the present case such refusal was proved. The defendant undertook to repudiate the contract and at the same time held the possession under and by virtue of it. If the plaintiff could have stood upon the contract and compelled performance or recovered damages for the breach, he was not bound to adopt that remedy, but had the right to bring ejectment to recover back his land. In so doing, and giving the preliminary notice to surrender possession, he too gave his assent to the abandonment of the contract; and the parties who made it having thus by mutual assent rescinded it, its validity was gone and it ceased to exist. Neither party thereafter could invoke its terms or protection as against the other; and the plaintiff was at liberty to maintain ejectment to recover the possession of the land to which he had a legal title. *Jackson v. Moncrief*, 5

Ex Parte Marks.

Wend. 26; *Wright v. Moore*, 21 id. 230; *Pierce v. Tuttle*, 53 Barb. 167.

[Minor matters omitted.]

Judgment and order affirmed.

ROSS and MCKINSTRY, JJ., concurred.

Hearing in banc denied.

EX PARTE MARKS.

(84 Cal. 29.)

Pardon — conditional.

Where a pardon is granted on condition that the prisoner leave the State and never return, and upon his promise to comply, he may be re-arrested if he has had ample opportunity to leave the State and has not done so.*

HABEAS corpus. The opinion states the facts.

Hall & Buckley, for petitioner.

Hart & White, contra.

ROSS, J. The petitioner, who was undergoing imprisonment in the State prison under judgment of conviction of the crime of murder in the second degree, was, by the governor of the State, granted a pardon upon condition that he forthwith leave the State and never return thereto. The governor, it seems, was induced to grant the pardon upon representations made to him to the effect that the prisoner was partially idiotic, that his parents resided in Poland and would take care of him if permitted to go to them, and that he had brothers of wealth in this State who would furnish him with the means necessary to take him there and would thereafter provide for his support. The pardon was given by the governor to the warden of the prison, to be by him delivered to the prisoner whenever the same was properly accepted. Upon its receipt the warden tendered the pardon to the prisoner, who refused to accept it unless it should be stipulated that he should be permitted to remain in the State for the period of eighty days after his discharge from the

* See *Arthur v. Craig* (48 Iowa, 264), 30 Am. Rep. 395.

Ex Parte Marks.

prison. The result of course was that he remained incarcerated. Some weeks afterward he indicated to the warden, who meanwhile had retained the pardon in his possession, his willingness to accept it and to faithfully perform the conditions upon which it was granted. Upon this representation and upon the prisoner's promise to leave the State on the train going east the following evening, the warden handed him the pardon and released him from custody. His brothers thereupon offered him sufficient funds to take him to his parents in Poland but he refused to go as he had promised, but declared his intention to remain in California unless his brothers gave him one thousand dollars. Thereupon he was again taken into custody by the warden, and now claims the right to be discharged on *habeas corpus*.

We think it clear that he is not entitled to be so discharged. There is no doubt that the governor was authorized to grant the pardon upon the conditions stated, for he is by the Constitution empowered to make such grants "upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons." Section 1, art. 7, Constitution.

The pardon in question contained two conditions — one, that the prisoner should forthwith leave the State; the other, that he should never return to the State. The one was a condition precedent, the other a condition subsequent. That is to say, the governor in effect said to the prisoner: By virtue of the power vested in me by the Constitution I exempt you from the punishment the law inflicts for the crime you have committed, provided you forthwith leave the State, and provided further, you never return to the State. Until he actually leaves the State the pardon does not become operative at all. This must be so from the very nature of the first condition attached to it. When that condition is performed the pardon becomes operative but it nevertheless remains subject to be defeated by the breach of the condition subsequent, to-wit, by the prisoner's subsequent return to the State. 1 Bish. Crim. Law, § 760; *Ex parte Wells*, 18 How. 311; *State v. Smith*, 1 Bail. 283; *Lee v. Murphy*, 22 Gratt. 789; *Flavell's case*, 8 Watts & S. 197. The pardon therefore never having taken effect, it results that the prisoner is not entitled to his discharge. It is no answer to say that the pardon was delivered to the prisoner. Apart from what has been already said, delivery of such an instrument is not complete without

McCord v. Oakland Quicksilver Mining Company.

an acceptance in good faith. The bad faith of the prisoner was demonstrated almost as soon as he got out of prison. Besides, the pardon was given to the prisoner by the warden upon the distinct agreement on his part to leave the State on the train going east the following evening. The subsequent conduct of the prisoner showed that he had no intention of doing any such thing. A pardon obtained by misrepresentation amounting to fraud is void. 1 Bish. Crim. Law, §§ 753, 754. Nor is there any force in the suggestion that in such cases the person pardoned may be deprived of the opportunity to comply with the conditions of the pardon. No court has the power to compel any executive officer to afford the person to whom a pardon has been conditionally granted an opportunity to comply with the conditions, for that would be to exercise the pardoning power in part. When the pardon has once taken effect then the party to whom it is extended acquires a right which the courts can and will of course protect. There is no reason however to suppose that in any case any executive officer would refuse to afford the party to whom a conditional pardon should be granted an opportunity to comply with the conditions and thereby secure its benefits. Every presumption is the other way. Should the fact be otherwise in any case perhaps some means might be discovered for giving effect to the governor's power. At all events in the present case ample opportunity was given the prisoner which instead of availing himself of, he abused.

Let the prisoner be remanded to the custody of the warden.

So ordered.

SHARPSTEIN, MYRICK and THORNTON, JJ., concurred.

McCord v. OAKLAND QUICKSILVER MINING COMPANY.

(64 Cal. 124.)

Tenancy in common — of mine — waste — injunction.

Where one of several tenants in common of a mine is working it in the usual way, and not excluding his co-tenants, he may not be called to account to them in an action for damages as for waste, nor restrained from thus working the mine.*

* See *Kean v. Connelly* (25 Minn. 222), 83 Am. Rep. 458.

McCord v. Oakland Quicksilver Mining Company.

ACTION for injunction and damages. The opinion states the case. The defendant had judgment below.

Estee & Boalt, for appellants.

Garber, Thornton & Bishop, for respondent.

McKINSTRY, J. The complaint alleges that plaintiffs are and have been owners and tenants in common of "The Lost Ledge" mining claim, the plaintiff McCord owning two hundred three-thousandth parts thereof; the plaintiff Griffith, three hundred and sixty three-thousandth parts thereof; the plaintiff Gibbs, one hundred and thirty-three and one-third three-thousandth parts thereof; the plaintiff Pond, sixty-six and two-thirds three-thousandth parts thereof; and the defendant twenty-two hundred and forty three-thousandth parts thereof.

That the defendant, "without authority or permission of the plaintiffs, or either of them," has been and is in the exclusive possession and occupancy of the entire premises, and during such occupancy "defendant has ever refused, and still does refuse, to admit the plaintiffs, or either of them, to the possession or occupancy of said premises, as tenants in common with defendant or otherwise, and has and still does exclude the plaintiffs and each of them from any possession or occupancy of said premises or any part thereof."

That during the time defendant has been in possession as aforesaid, it has been, and still is, without the consent or permission of either of plaintiffs, actively engaged and employed in mining in and upon said premises; and with a large number of men and machinery employed for that purpose, has been and still is excavating in and upon the premises, and constructing tunnels and shafts therein, and excavating large quantities of cinnabar therefrom, and cutting down and consuming and destroying growing trees and timber upon said premises, and thereby irreparably injuring and damaging said premises.

That the cinnabar so taken from said premises is of the value of \$100,000 and upwards.

That a large quantity of the cinnabar so taken from said ground by defendant has been by it reduced and converted into quicksilver, and the quicksilver by it sold and disposed of, and the proceeds converted by the defendant.

McCord v. Oakland Quicksilver Mining Company.

That the defendant has hitherto refused and still refuses to deliver to plaintiffs, or either of them, any part of said cinnabar or quicksilver, or to pay over to them, or either of them, any portion of the proceeds of said sales.

That defendant has been and still is engaged in cutting down and destroying the growing trees upon said premises, and converting the same into wood and timber, "which said defendant has been and still is using for purposes of fuel and in the construction of shafts, tunnels, machinery, and other structures in and about, carrying on its said business of mining in and upon said premises."

That the value of said trees, wood, and timber, so converted by defendant, is about five thousand dollars, and that defendant has refused and still refuses to pay to the plaintiffs, or either of them, "any part or portion of such value."

That defendant has refused and still refuses to give plaintiffs, or either of them, any statement or information in detail "of the quantity or value of the cinnabar so taken from said ground, or of the quicksilver produced therefrom, or of the amount realized from the aforesaid sales of the same, or of the quantity or value of the trees, wood, and timber, so taken and converted as aforesaid."

That defendant threatens and intends to continue to prosecute, for its own use and benefit, the business of mining in and upon the premises, and its excavations and diggings of cinnabar, and its reduction of the same into quicksilver, and the sale and conversion of the same, etc., and will so continue unless enjoined. That defendant has no other property, etc.

That by reason of the premises plaintiffs have sustained great damage, to-wit, in the sum of \$105,000, or thereabouts.

The prayer is : For an injunction, restraining and forever enjoining defendant from prosecuting "the business of mining" in or upon the premises, or from digging, excavating, or constructing shafts or tunnels in or upon the same, or from extracting cinnabar or other minerals therefrom, or from cutting down, injuring, or destroying any trees or timber upon said premises, or committing waste thereon, in any manner ; that plaintiffs and each of them be admitted to the occupation and possession of said premises as tenants in common with said defendant ; that they recover of said defendant "the said sum of \$105,000," for their damages, and that said damages "be trebled, in pursuance of section 732 of the Code

McCord v. Oakland Quicksilver Mining Company.

of Civil Procedure," and for such other and further relief as the nature of the case may require, etc.

The court below found that the defendant had never claimed the entire mine, and had never excluded the plaintiffs from the common possession, and that plaintiffs had never entered, nor ever intended or desired to enter into the actual occupation. As the testimony was substantially conflicting, we would not be justified in setting aside these or the other findings.

The material questions presented are :

Does the excavation and removal of cinnabar from a quicksilver mine, or the cutting of timber trees used in working the mine, by one tenant, constitute waste for which his co-tenants may recover treble damages under section 732 of the Code of Civil Procedure ?

Does such excavation and cutting and conversion constitute waste which should be enjoined ?

Are the plaintiffs entitled to an accounting ?

1. Section 732 reads : " If a guardian, tenant for life or years, joint tenant or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be a judgment for treble the damages."

In *Elwell v. Burnside*, 44 Barb. 447, it was said: " By the common law one tenant in common could not be guilty of committing waste; that is, the same acts, which if committed by a tenant for life or years would constitute waste, would not be waste when committed by a tenant in common. He was not liable to his co-tenant in an action for waste, for the injury done to their common estate. As he is now however liable by statute (referring to a statute similar to the section of the Code above recited), to respond to his co-tenant in this form of action for those acts which constituted waste when committed by a tenant for life or years, we must resort to the common law to ascertain whether the acts complained of in this case would be waste had they been committed by a tenant for life or years."

In the case now before us the quicksilver mine had already been opened when plaintiffs and defendant became tenants in common. If therefore it be conceded that under the provision of our Code a tenant in common is subject to the action in like circumstances as is a tenant for life or years, the plaintiffs cannot recover damages as for waste. " As to all tenants for life, the rule has always been

McCord v. Oakland Quicksilver Mining Company.

that the working of open mines is not waste." And a tenant for life may open new pits or galleries without committing waste. *Neel v. Neel*, 19 Penn. St. 328. A tenant for years is not guilty of waste in taking ore from the mine, the sole subject of his demise, during his term. That is what he pays rent for.

It may be urged, that as between lessor and lessee for years, their contract contemplates the extraction of minerals, and in case of a life estate the grantor or donor must intend that his grantee or donee shall receive some benefit from his estate. But is it not also true from the very nature of mining property in this State, valuable only because of the mineral it is supposed to contain, that each of the co-tenants may use it in the only way it can be used? The co-tenants out of possession may at any time enter into an equal enjoyment of their possession; their neglect to do so may be regarded as an assent to the sole occupation of the other. This is but another application of the principle announced in *Pico v. Columbet*, 12 Cal. 414. True the co-tenants will not be held to assent to the commission of waste by the sole occupant, but the question returns, what acts done by him are waste?

It cannot be doubted that on the part of a mere trespasser it is a wrong in the nature of waste to remove any ore from a mine. The cases cited by appellants fully sustain this proposition. But it is not a just inference that as between tenants in common the rule is the same. Section 732 of the Code of Civil Procedure does not relate to trespasses committed by those who have no interest in the property. Nor does it define "waste," or declare what acts committed by a guardian, tenant for life or years, or joint-tenant, or tenant in common, as the case may be, shall be waste. For the appropriate meaning of the word, as applicable to acts done by these several classes of persons, we are relegated to the principles of the common law, and to various considerations of policy arising out of different conditions which the common law recognizes and approves.

The word "waste" is not an arbitrary term to be applied inflexibly without regard to the quantity or quality of the estate, the nature and specie of the property, or the relation to it of the person charged to have committed the wrong. As was said by ROANE, J., in *Findlay v. Smith*, 6 Munf. 134, "in considering what is waste in this country, it is to be remarked that the common law by which it is regulated adapts itself in this as in other cases to the varied

McCord v. Oakland Quicksilver Mining Company.

situations and circumstances of the country. * * * The law on this subject must be applied with reasonable regard to circumstances."

In the mining regions of this State where title to a lode can be acquired from a United States government only after work of certain value has been done upon it, can it be that if one of several locators or owners shall assume the sole risk of developing the mine, he shall become liable to those who have taken no chance of possible loss, not only for an accounting as to net profits — supposing him to be fortunate enough to secure any — but also as a *tortfeasor*, for three times the value of the whole, or for a proportionate share of the ore taken out?

It will be observed, upon the facts herein, no question arises as to unnecessary damage done to the mine or its works, by reason of reckless or unskillful management of the business by the tenant conducting it. There may be cases in which the courts will impose damages for an abuse of his right by a co-tenant in occupation or interpose to prevent such abuse. But here the theory of plaintiffs is that defendant could not extract ore from the mine without committing waste, because such extraction is a destruction of the very substance of the estate; an irreparable injury to the inheritance.

In view of the character of the property and of plaintiffs' implied assent to its sole occupation by defendant for mining purposes, we regard the right of the latter to the proceeds of its operations as partaking of the nature of a usufruct; the appropriation of the net returns as a legitimate participation of the profits and its acts of mining as not impairing or consuming the estate to any greater extent than must be presumed to have been intended to be allowable by each of the parties in interest.

Murray v. Haverly, 70 Ill. 320, supposing it to have been correctly decided, does not entirely sustain the view of counsel for appellants. That decision was based upon a statute which authorized a tenant to bring trespass or trover against his co-tenant who should "take away, destroy, lessen in value or otherwise injure" the common property. The section of our Code does not declare that a co-tenant who "shall take away," etc., shall be guilty of waste. The question of waste or no waste is left to the courts. Besides in *Murray v. Haverly* the court had already decided the case by holding certain evidence, as to license, inadmissible under the defendant's plea.

Counsel quote from Freeman on Co-tenancy: "In all cases where

McCord v. Oakland Quicksilver Mining Company.

a co-tenant practically destroys the estate or some part thereof, trespass may be sustained by the injured co-tenant." § 302. But this is to be taken with other portions of the same work where the distinction is pointed out between an appropriation of the proceeds, rents, profits, or income, and the destruction of the estate itself. See also Waterman on Trespass, 947. The tenant in common of a mine may occupy it for the purpose contemplated by all, even though a portion of the soil or ore be removed. Each tenant has the right to use the mine, and as was intimated by the Supreme Court of Pennsylvania, so long as an estate is used according to its nature "it is no valid objection that the use is consumption, and it is no fault of the tenant that it is not more endurable." *Irwin v. Covode*, 24 Penn. St. 162. The taking of ore from the mine is rather the use than the destruction of the estate—within the meaning of the general rule. The results of the tenant's labor and capital are in the nature of proceeds or profits, the partial exhaustion being but the incidental consequence of the use.

It is not necessary to examine in detail the many cases cited by appellants, as in none are the facts like those of the case at bar. We shall refer to a few of them.

Delaney v. Root, 99 Mass. 546, was an action of trover for the conversion of personal property. *Stetson v. Day*, 51 id. 434, simply decides that under a statute of Maine a tenant for life who neglected to pay taxes assessed upon the estate during his tenancy, and thereby subjected the estate to a sale, was liable to an action by the reversioner, either of waste or of case in the nature of waste. *Maddox v. Goddard*, 15 Me. 219, and *Symonds v. Harris*, 51 id. 14, were actions of trespass *quare clausum* for the destruction of a mill and for the disseverance and removal of machinery from a mill; *Blanchard v. Baker*, 8 Me. 253, trespass on the case for a similar injury to common property; *McDonald v. Trafton*, 15 Me. 225, has no bearing upon any question involved in the case before us; and *Hubbard v. Hubbard*, 15 Me. 198, was a statutory action of trespass "for strip and waste" of timber.

As to the destruction of trees charged in the complaint herein, it has been expressly decided in California that in the enjoyment of his legal rights in the common property, each co-tenant may cut timber, and use or dispose of it at least to an extent corresponding to his share of the estate. *Hihn v. Peck*, 18 Cal. 640. In the case before us there is neither averment nor finding that defendant has

McCord v. Oakland Quicksilver Mining Company.

cut or consumed more than its share. Besides, the use of the trees was merely incidental to the mining operations of defendant. In Pennsylvania it is held that the cutting of timber to be used in a mine by a tenant for life, whose mining is not waste, is not itself waste. *Neel v. Neel*, 19 Penn. St. 33. Nowhere is it held to be waste for a tenant in common of a farm to cut wood necessary to the use of the farm.

It was indeed held in New York by the Supreme Court that the cutting down of timber trees by one of several co-tenants, upon land whose principal value consisted of the growing timber was waste, for which the other co-tenants could recover damages under a clause of the Revised Statutes of that State. *Elwell v. Burnside*, 44 Barb. 447. But, aside from the rule to the contrary laid down in *Hihn v. Peck*, 18 Cal. 640, plaintiffs have no averment that the quicksilver mine is "principally valuable," because of the trees growing from its surface.

And here it may be added, applying the rule of *Hihn v. Peck*, it would seem each tenant in common of a mine is at least entitled to take out his share of the ore. That neither of the tenants can "look into the ground" may be a reason why a court of equity should order an account to be taken, but ought not to operate a prohibition upon the working of the mine by anybody.

2. Ought the court below to have enjoined defendant from proceeding with its mining?

"In case of joint tenants and tenants in common, with respect to whose acts of waste the common law has provided no remedy, courts of equity will interfere when it appears that waste has been committed or threatened by one tenant in common, who has become possessed of the whole premises." Taylor Land. and Ten. 694. This general proposition may be conceded to be correctly stated, but the very question here is — has waste been committed? At the common law the tenant had no redress for acts of admitted waste committed by his co-tenant. But the latter might be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, which were called "equitable waste," because allowable at law. By our statute however a tenant may recover damages of his co-tenant in every case of waste. Holding as we do that the acts of defendant were not, under the circumstances, wanton or destructive, or any waste, it follows plaintiffs were not entitled to an injunction.

McCord v. Oakland Quicksilver Mining Company.

Counsel rely upon the opinion of the Court of Chancery of Upper Canada, in *Dougall v. Foster*, 4 Grant, U. C. 319, where it was held (ESTEN, V. C., diss.) that one tenant in common would be restrained at the suit of his co-tenant from digging earth for bricks on the joint property. There the bill alleged that the portion of the lot from which the clay was being excavated and carried away was very valuable for building purposes, and that (with reference to such purposes) the lot had greatly deteriorated in value by reason of the acts of defendant. In his opposing affidavit defendant did not deny the first of these alleged facts at all, and did not expressly deny the last. The chancellor said: "It is quite true that this court refuses to restrict a tenant in common from the legitimate enjoyment of the estate, because an undivided occupation is of the very essence of that sort of title (Co. Litt. 180), and to interfere with the legitimate exercise of that right would be to deny an essential quality of the title." The court held that the legitimate enjoyment of a building lot, "within the limits of the town of Belville," was to build upon it, or improve or occupy it as town property is usually improved and occupied, and that to dig holes in it, or degrade it below the surrounding level, was not such legitimate enjoyment. To repeat the language of ROANE, J. (*Findlay v. Smith, supra*), "The law on this subject must be applied with reasonable regard to circumstances." If it had appeared in *Dougall v. Foster* that the common property was valuable only as a brick-yard, and was acquired by the co-tenants for that purpose, the case would have approximated more closely to the one at bar. By the laws of the United States the mining lands are disposed of under laws differing from those through which agricultural lands may be acquired. As a condition to their acquisition by individuals, it is requisite that the locators shall have done mining work of a certain value. They are disposed of and acquired for the purpose of mining, and the application of them to that purpose by one tenant in common is not waste of which the others can complain.

Hawley v. Clowes, 2 Johns. Ch. 122, was a bill for partition, and for cutting down and carrying away timber, not wanted for the necessary use of the farm. The injunction was granted, in view of the special character of the case, and the insolvency of defendant, and on the ground that the excessive cutting of timber was destructive, "and not within the usual and legitimate exercise of the enjoyment." Chancellor KENT added: "The remedy is

McCord v. Oakland Quicksilver Mining Company.

peculiarly appropriate and proper, pending a partition of the very land."

In *Hole v. Thomas*, 7 Ves. 589, Lord ELDON, after saying, "I never knew of an instance of an application to stay waste by one tenant in common against another; one tenant in common having the right to enjoy as he pleases," granted an injunction against cutting "saplings or any timber trees or underwood at unseasonable times," that being destructive. As was said by ESTEN, V. C., in *Dougall v. Foster*, it was malicious waste. *Twort v. Twort*, 16 Ves. 128, was a case where one tenant in common was an "occupying tenant" to another. In *Baker v. Whiting*, the tenant in common was the agent of his co-tenants, and the case does not assist the present investigation. 3 Sumn. 485.

It is said by Eden (Waterman's Eden on Injunctions, vol. 2, 3d ed. 210), the instances in which injunctions have been granted between tenants in common against committing waste are few. The application has always been refused, unless attended with peculiar circumstances. In *Smallman v. Onions*, 3 Brown Ch. 621, an injunction was granted against the cutting of timber, on the ground that the parties were only equitable tenants in common, the legal title being in a trustee; that therefore the person who was committing the waste had no title to the possession, and cutting the timber was a trespass upon the trustee; also that the trespasser was insolvent. And in *Goodwyn v. Spray*, 2 Dick. 667, the lord chancellor denied an injunction prayed for by one tenant against his co-tenant cutting timber, saying the only remedy the plaintiff had was to get a partition.

In the absence of allegations, proofs of findings of willful injury, or of unnecessary injury or destruction caused by the negligence or unskillfulness of defendant, the plaintiffs were not entitled to an injunction.

3. Is this an action for an accounting?

It is established in this State, that in ordinary cases an action at law cannot be maintained by a tenant in common against a co-tenant in sole possession of the premises, to recover a share of the profits derived from the estate by means of the labor and money expended by the party in occupation. The occupation by one tenant, so long as he does not exclude his co-tenant, is but the exercise of a legal right. The money he invests at his own risk; if his transactions result in a loss he cannot call upon his co-tenant for

McCord v. Oakland Quicksilver Mining Company.

contribution, and if they result in a profit his co-tenant is not entitled to share in such profit. *Pico v. Columbet*, 12 Cal. 414. The demand of the plaintiffs is not for a sum due by way of rent from defendant as the tenant of their interest, nor is it for a proportionable share of an amount received by defendants for the use and occupation of the premises by third persons, nor is an account sought as an incident to a claim for partition. It is not for their part of moneys received by defendant which belong to all the tenants in common, nor is it based upon an allegation of any of the exceptional facts mentioned in *Pico v. Columbet*, 12 Cal. 414; in *Goodenow v. Ewer*, 16 id. 461; and in *Abel v. Love*, 17 id. 233. See also *Howard v. Throckmorton*, 59 id. 89.

Nor is the present an action brought to recover a portion of the profits acquired by the expenditure of defendant's money, treating it as the agent of plaintiffs in developing the common property. There is no pretense of an averment of any actual contract between plaintiffs and defendant, whereby the latter was authorized to act for the former. On the contrary, it is expressly alleged in the complaint that the acts of defendant were against the will of plaintiffs, and without their consent.

Again, the tenant in occupation is not made the bailiff of plaintiffs, in the absence of a contract of agency, by any statute of this State. The statute of Anne 4, 5, 16 has never been adopted here, and if it had been adopted, that statute would seem only to have applied to cases where one tenant in common had received from a third person money, or other thing of value, to which both tenants were entitled by reason of their co-tenancy, and retained more than his just share according to the proportion of his interest. *Pico v. Columbet*, *supra*; *Henderson v. Eason*, 9 Eng. L. & Eq. 337.

If the appropriation by defendant of the net proceeds of its enterprise be considered as merely the legitimate perception of the profits, the action cannot be maintained as an action for an account.

Izard v. Bodine, 3 Stock. 403, cited by counsel for appellants, does not sustain their view. There the bill was for partition and account. The Supreme Court of New Jersey held: 1. If one tenant in common oust his co-tenant, the latter must first establish his right at law, and thus recover the *mesne* profits—"for one tenant is bound to account to another only as his bailiff appointed by contract, express or implied." 2. Where one tenant in common "actually receives" the rents, issues and profits, then

McCord v. Oakland Quicksilver Mining Company.

he may be compelled to account for such profits actually received. (From third persons.) But this by statute, both in England and in this State, and not by the common law. 4 Anne, chap. 16; New Jersey Act of 1794; *Sargent v. Parsons*, 12 Mass. 149. 3. Where one tenant actually occupies the whole estate without claim on the part of his co-tenants to be admitted into possession, he is under no obligation to account, "for he has a right to such occupancy." Citing Co. Litt. 200, *b*; *Sargent v. Parsons*, 12 Mass. 149; *Meredith v. Andres*, 7 Ired. 5; *Colburn v. Mason*, 25 Me. 434.

Appellants also refer to *Nelson v. Clay*, 7 J. J. Marsh. 139. But in that case, the court after saying that a statute of Virginia, which like the English statute, authorized "actions of account in favor of one joint tenant or tenant in common against another, as his bailiff, for receiving more than his just share," was in force in Kentucky, held that the statute did not apply when the estate at the commencement of the tenancy in common yielded no rent or profits, and one of the tenants entered and by improving the estate rendered it productive; the other co-tenant having expended neither money nor labor.

In *Shiels v. Starks*, 14 Ga. 436, the court adjudged that under the statute of Anne, in force in Georgia, a tenant in exclusive occupation was liable to his co-tenant for a proportionate share of the value of the use and occupation; admitting that it had been held in Massachusetts (*Sargent v. Parsons*, 12 Mass. 149), that under the statute of Anne it is necessary to charge the defendant with having received rents and profits "otherwise than by his occupancy." We do not find the language attributed to Dane by the learned court of Georgia (Dane's Abr., 1 vol., chap. 8, art. 3, p. 170), in our edition of the work referred to. *Shiels v. Stark*, was a bill in equity for a partition and an account.

If it be conceded that the peculiar nature of mining property of itself constitutes such an equity as that the tenants, who could at any time have entered into the joint possession, but who have never expended labor or money upon the common property, or become liable for any portion of the loss which might have followed upon the enterprise of their co-tenant, ought to be entitled to demand an accounting from the latter, and to recover a portion of the net profit gained exclusively by its efforts and capital—the present is not an action for such an accounting. The defendant is charged with having irreparably injured the premises by taking

McCord v. Oakland Quicksilver Mining Company.

therefrom cinnabar of the value of \$100,000, and cutting thereon growing trees of the value of \$5,000. The plaintiffs aver they have been damaged in the sum of \$105,000, and pray amongst other things, that they may have a judgment for three times that sum. It is alleged that defendant has converted the cinnabar and the proceeds of sales of it and the trees, and "has refused to deliver to the plaintiffs any part of the cinnabar taken from said ground or the quicksilver so produced therefrom, or to pay over to them any portion of the proceeds of said sales, and denies to the plaintiffs and each of them any share or interest in the same." But neither this nor any other averment found in the complaint makes the action one for an account, legal or equitable. The averments in the complaint, except in so far as they constitute a declaration in ejectment (and as we have seen the court below found that defendant had never disseised or ousted the plaintiffs), are of facts alleged by plaintiffs to establish waste committed by defendant upon the common property, for which treble damages are asked.

Nevertheless since the property is described in the complaint and the exclusive occupation and working of the mine by defendant averred therein, and inasmuch as the court below did in fact take an account, we have looked into the findings and evidence with respect thereto.

We have said that the net proceeds from the working of the mine were rather in the nature of profits from the use than the result of the destruction of the inheritance. But it may be conceded, for the purposes of this decision, that the relation of the tenants in common, under the circumstances disclosed, is *sui generis*, and their rights peculiar. That while the extraction of ore from the mine by one tenant, who does not exclude his co-tenants, is not waste, and the neglect of the latter to enter should be held an assent on their part to the exclusive occupation by the former; yet because the effect of the exclusive working by one may be to exhaust the mineral, and the uncertainty of the prospective value of the property may render it impossible to make a just partition of it, a court of equity should order an accounting; holding that while it must have been contemplated by the parties that the tenant in occupation should not be held for waste, nor prohibited from proceeding with his work by the co-tenants who do not seek to enter, yet it must also have been contemplated that the tenant in occupation should not appropriate to himself the entire

McCord v. Oakland Quicksilver Mining Company.

profits. If this be so however the co-tenants, not in actual occupation, applying for such account should at least be required to do equity — to allow to the defendant all sums actually expended for the protection of the common property.

The court below found: “The defendant has taken from said mine, since the 18th day of March, 1876, a great number of tons of ore, and has taken therefrom a large sum of money, and that all thereof has been expended in the proper, economical and necessary development and working of said mine for said ore, and in the proper, economical and necessary reduction of the said ores, and in properly, economically and necessarily defending at law the common title to said property, and in proper payment for an outstanding title thereto.”

The parties here are not mining partners, between whom an accounting is sought. If they can properly be termed partners “in the profits” (see the *dictum* in *Abel v. Love, supra*), they have not by the averments of their complaint declared themselves partners in any broader sense. By filing their complaint they did not make themselves liable to the defendant, or to creditors of defendant, in case the account of defendant’s transactions should show such transactions had resulted in a loss; they did not make the defendant their agent as to debts by it created beyond the proceeds from its mining, nor did they subject their interest in the mine to any debts of its creation. In their complaint they impliedly, if not expressly, disavow any such purpose. If the plaintiffs here are entitled to an account, their claim to it is based upon special equities; their appeal to the court of equity is on the ground that defendant ought, under the peculiar circumstances, to pay them a share of the profits. It would seem plain that an equity is in turn imposed upon them to allow a rebate for expenditures necessarily incurred in protecting the common possession and in buying in an outstanding title, paramount to that of the co-tenants, or such as a prudent man would deem it proper to purchase to avoid expensive and dangerous litigation.

4. Conceding, for the sake of the argument, such an action might have been maintained, the present is not an action to recover rent of the defendant as successor to the tenants previously in occupation.

Judgment and order affirmed.

Ross and McKee, JJ., concurred.

PEOPLE V. MARKHAM.

(84 Cal. 187.)

Statute — construction — bribery.

A police officer, taking money in consideration of his promise not to arrest a certain class of offenders, is guilty of receiving a bribe under a statute denouncing the receiving of a bribe by any executive officer in a matter which "may be brought before him in his official capacity."

CONVICTION of receiving a bribe. The opinion states the case.

Moore, Laine & Lieb, for appellant.

Marshall, attorney-general, and *Campbell*, district-attorney, for respondent.

MCKINSTRY, J. The charging part of the information is as follows: "The said W. W. Markham on the 30th day of December, A. D. 1882, at the county and State aforesaid, then and there being an executive officer, namely a police officer of the city of San Jose, county of Santa Clara aforesaid, did ask, receive, and agree to receive a bribe, to-wit, fifteen standard dollars, lawful coin of the United States of America, upon an understanding and agreement that he would not arrest persons engaged in violating section 330 of the Penal Code of the State of California, nor would he arrest persons engaged in violating the gaming ordinance of the said city of San Jose, contrary to the form of the statute," etc.

[Omitting minor matters.]

Section 68 of the Penal Code reads: "Every executive officer * * * who asks, receives, or agrees to receive any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, of which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State prison not less than one nor more than fourteen years," etc.

The seventh section of the same Code defines the word "bribe" to signify any thing of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted

People v. Markham.

with a corrupt intent to influence unlawfully the person to whom it is given in his action, vote or opinion in any public or official capacity.

The objection of appellant's demurrer is more specifically stated in his points filed in this court. "There was nothing (in the information) to show that any thing ever could or did come before him in his official capacity concerning the matter."

If we understand the argument of counsel it is to the effect that the information should have stated that section 330 of the Penal Code was being violated by certain persons when the \$15 was given and received, with the understanding that defendant should not arrest such persons, or that when the money was paid it was paid in contemplation of an intended violation of the section by certain persons, and was received under an agreement of defendant that he would not arrest such persons. Further that in case the information had alleged that section 330 was being violated when the money was paid, it should also have alleged that defendant in fact failed to arrest the persons guilty of such violation. At the least the argument of counsel for appellant involves the proposition that in case the information alleges that money is paid a police officer, and by him received with the understanding that he will not arrest persons who subsequently shall commit a certain crime, it must also allege that some person or persons did subsequently commit the crime, and the officer having the opportunity and ability to arrest failed to arrest such person or persons.

But we think when a police officer receives money in consideration of his promise that he will not arrest any one of a class of offenders against the criminal laws he is guilty of receiving a bribe, because the case of one who has committed the offense and the consequent duty of the officer to arrest is "a matter which may be brought before him in his official capacity." We are of opinion that a police officer who shall receive a weekly stipend, or a single payment of money in consideration of his promise not to arrest any violator of the gaming law is not only morally guilty but may be found guilty under the statute, without his trial involving the necessity of the prosecution establishing the commission of a distinct crime by a third person, together with a want of energy and efficiency on the part of the officer in securing the arrest of the third person.

The scope of the definition of bribery is as broad as the duties

People v. Markham.

of the officer who accepts the bribe. It is the duty of a police officer to arrest, with or without warrant, according to circumstances, every person who violates section 330 of the Penal Code. If therefore he agreed in consideration of money paid him not to arrest any person who should violate section 330, it would seem to the ordinary comprehension that he was bribed with respect to a matter which might be a subject of his official action.

In opposition to the view above set forth appellant cites certain cases. They are: *People v. Purley*, 2 Cal. 564; *Barefield v. State*, 14 Ala. 603; *Collins v. State*, 25 Tex. Supplement, 202; *State v. Hughes*, 43 Tex. 518; *Newell v. Commonwealth*, 2 Wash. (Va.) 88, and *Old v. Commonwealth*, 18 Gratt. 918.

But the decision in *People v. Purley* turned upon the phraseology of a statute different from that now under consideration. It was held that under the statute of 1850, which confined the offense of bribery of a judicial officer to the payment or offer to influence such officer "to act more favorably to one side than the other in a suit, matter, or cause, or pending or brought before him," it should appear that a particular legal proceeding named in the presentment was commenced or at least was to be commenced.

In *Barefield v. State* the defendant below had been indicted for bribing a justice of the peace by corruptly promising him \$25 to influence his decision in a certain controversy or proceeding that might be brought before him, wherein Miles Barefield was to be plaintiff and W. H. Owen was to be the defendant.

Two of the three judges of the Supreme Court of Alabama held that while an offer to bribe a judicial officer was a grave offense at the common law, yet under the statute (similar to ours) it was necessary to constitute the bribery, that there must have been an acceptance of the bribe; and also it must appear that the cause or proceeding was pending before the justice when the offer was made, or that the cause or proceeding was afterward instituted so that in the ordinary course of it would come before him. Mr. Justice CHILTON dissented from his brethren upon both the points on which their conclusion rested, and we concur with his view of the law. He said: "But I feel constrained to differ with my brethren as to the construction which they place upon the statute under which the conviction was had. In my judgment it is not indispensable that the matter, cause or proceeding in which the decision or judgment of the of-

People v. Markham.

ficer is to be influenced by the bribe should afterward be actually brought before him, in order to constitute the offense. But if the party corruptly give or promise any gift or gratuity whatever 'with intent to influence the act, vote, opinion, decision or judgment' of any officer, whether executive, legislative, or judicial, on any matter, cause or proceeding which may be then pending, or may by law come or be brought before him in his official capacity, the crime is complete, although the matter never should come before such officer. The law, it is well remarked, abhors the least tendency to corruption; and at common law, attempts to bribe, though unsuccessful, were held indictable. 1 Russ. Crimes, 156; *United States v. Worrall*, 2 Dall. 384; affirmed in *Rex v. Plympton*, 2 Ld. Raym. 1377; *Rex v. Vaughan*, 4 Burr. 2494; *Rex v. Polman*, per Lord ELLENBOROUGH, 2 Camp. 230. It is true the intention to corrupt the justice in regard to his anticipated action upon the case is not an offense which the law can punish; but when that intention is evidenced by overt acts—when the promise is complete to confer upon the officer the reward, as a premium to incline him to act contrary to his duty, and in violation of the known rules of honesty and integrity—the defendant has done his part toward consummating the guilt, and the punishment inflicted is not disproportionate to the demerit of his crime. The matter, cause, or proceeding must be one which may come before him, that is, comes within his jurisdiction; or which may be brought before the officer, or which may be pending at the time of the corrupt promise. The legislature, I think, did not intend that the prosecution should depend upon the fact whether the officer actually had it in his power to carry out the corrupt agreement before the indictment was exhibited. It is sufficient, I think, that the subject-matter upon which the bribe was to operate existed, and could legally be brought before the officer in his official capacity. The offense consists, in contemplation of the statute, in poisoning and corrupting the fountain of justice, and although the particular deleterious consequence designed to be effected by the parties has not ensued, the State nevertheless has an officer corrupted, and society has lost all protection for its rights, so far as the administration of the law by him is concerned."

In *State v. Hughes* the defendant was indicted under a statute which made it a felony to bribe a witness. It was held that a charge that the defendant offered a person money to avoid becom-

ing a witness was not authorized by the wording of the statute. In *Newell v. Commonwealth*, decided in 1795, it was said that a common-law information which attempted to allege that defendant, a justice of the peace, corruptly received a bribe to vote for a certain person as clerk of the peace, and that he did vote for such person, was too uncertain in not averring that an election for clerk of the peace was in fact held. In *Old v. Commonwealth* the only question considered was whether the evidence justified the verdict of guilty. It was that a new trial was properly denied. In *Collins v. State*, 25 Tex. Supplement, 202, the indictment, founded upon a statute, omitted to state that the matter, to influence his action upon which it was alleged money was offered to the district-attorney, was a matter of such nature as ever could come before him for official action.

None of the cases cited, when analyzed, would require a construction such as is claimed by appellant to be the correct construction of the section of our Code. The nearest case is *Barefield v. State*, and of that case we remark that the reasoning of the dissenting judge is to us more satisfactory than that of the prevailing opinion.

Here the duty of the defendant was to arrest those violating a certain law, and the duty was one which he might at any time be required to discharge. The matter might be presented to him for official action. The 67th section of the Penal Code provides that any person who gives or offers a bribe to any executive officer, with intent to influence him in respect to any act, etc., as such officer is punishable. By the 67th section the offense defined is that of one who offers; by the 68th, that of one who receives a bribe. If the witness who testified he paid money to the present defendant was informed against, would it not be enough to allege in the information that he paid the money in consideration of a promise that the officer would not arrest any person for a violation of section 330 of the Penal Code? His offense was complete. In the language of Mr. Justice CHILTON, "the legislature did not intend that the prosecution should depend upon the fact whether the officer actually had it in his power to carry out the corrupt agreement before the indictment was exhibited." See also *People v. Ah Fook*, 64 Cal. 380; *People v. Kalloch*, 60 id. 113, in no degree conflicts with the views above expressed.

[Minor matters omitted.]

Barstow v. Savage Mining Company.

The order denying defendant's motion in arrest of judgment is not appealable.

Judgment and order denying new trial affirmed.

ROSS, MYRICK, SHARPSTEIN, MCKEE and THORNTON, JJ., concurred.

BARSTOW V. SAVAGE MINING COMPANY.

(64 Cal. 388.)

Corporation — title to stolen stock certificates.

A *bona fide* purchaser of certificates of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title.

ACTION for transfer of stock. The opinion states the case. The defendant had judgment below.

Columbus Bartlett and Claude L. Smith, for appellant.

George W. Gordon, for Savage Mining Company, respondent.

James A. Waymire, for respondent Rogers.

MYRICK, J. The facts of this case, as presented in the findings, are substantially as follows:

Prior to February 5, 1879, the defendant, the Savage Mining Company, duly issued its three certificates of stock, No. 24843, certifying that C. A. Schmitt, trustee, is entitled to thirty shares of the capital stock of the said company, transferable on the books of the company by indorsement on and surrender of the certificate; No. 25537 in the name of Randolph, Mackintosh & Company, trustees for ten shares, and No. 25704 in the name of Greenbaum, Helbing & Company, trustees, for ten shares, in like tenor as the first. On the 5th of February, 1879, the plaintiff purchased from the owners thereof, for value paid, the said fifty shares, and received the said certificates properly indorsed. Thereafter on or about May 1, 1879, the said certificates were, without any fault or negligence of the plaintiff, stolen from him, and were on the 6th of May, 1879, sold and delivered by the thief to the defendant Rogers, he, Rogers, purchasing the same in the usual course of

Barstow v. Savage Mining Company.

business, for value, without notice of any defect in his vendor's title. The plaintiff never sold the certificates or the stock which they represent or authorized or acquiesced in, or ratified such sale. On the 30th of May, 1879, plaintiff demanded of the defendant Rogers the return of the certificates, and Rogers refused to deliver them. The intervenor, Kutz, purchased the certificate for thirty shares (subsequently to the theft) in the ordinary course of business, for value, without notice of any defect in his vendor's title, and whatever title he (Kutz) has, he derived from Rogers. None of said fifty shares have been transferred on the books of the company from the names of the parties set forth in said certificates, except the ten shares represented by certificate No. 25537, which have been sold for assessment. After the theft the plaintiff duly demanded of the company a transfer of said fifty shares from the names in which they stand as aforesaid to his own name, and the issuance to him of a certificate therefor, and such transfer and issuance were refused. On the 11th of August, 1879, the intervenor presented certificate No. 24843 to the company, offered to pay any assessment levied on the stock represented thereby, and demanded a transfer to himself of the thirty shares and the issuance to him of a new certificate, which transfer and issuance were refused on the ground that the company had already been notified by plaintiff of his ownership of the stock and of the theft, and been directed to stop transfer thereof, and had been, in connection with Rogers, sued by plaintiff concerning the ownership of the stock. The court then found as to the value of the stock at the different times involved in the transactions. From these facts the court below concluded as law that the intervenor, Kutz, was entitled to judgment against the plaintiff and the company for his costs, and against the company for \$460 damages, and that the defendant Rogers was entitled to judgment against the plaintiff for his costs, and rendered judgment accordingly. From this judgment the plaintiff appealed.

It will be seen from the foregoing that the question for consideration is, if shares of stock of a corporation, standing in the name of A. on the books of the corporation, be owned by B., the certificate being properly indorsed, and if the certificate be stolen without the fault or negligence of B., does the purchaser from the thief take title so as to prevent B. from claiming the property?

1. It is well known to be the general rule that a thief acquires no title to the stolen property, and that he can pass none. "The

Barstow v. Savage Mining Company.

mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title." *Covill v. Hill*, 4 Denio, 323. To the general rule above stated there are exceptions as to money and negotiable securities.

2. A negotiable instrument is defined to be "a written promise or request for the payment of a certain sum of money to order or bearer." § 3087, Civil Code. There are six classes of negotiable instruments, namely, (1) bills of exchange; (2) promissory notes; (3) bank notes; (4) checks; (5) bonds; (6) certificates of deposit. § 3095, Civil Code.

A certificate of stock, namely, that A. is the owner of shares of stock in an incorporated company, is not a promise or request for the payment of money, nor does it contain any of the elements of such promise or request. "A negotiable instrument must not contain any other contract than such as is specified in this article." § 3093, Civil Code.

"The distinction between all these (notes, bills, corporation bonds) and corporate stocks is marked and striking. Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation." *Mechanics' Bank v. N. Y. and N. H. R. Co.*, 13 N. Y. 627; *Sherwood v. Meadow Valley Mining Company*, 50 Cal. 412.

The case last above cited, *Sherwood v. Meadow Valley Mining Company*, was an action based on the following facts: One Schmeidell was the owner of twenty shares of the stock of the defendant and held a certificate therefor issued to himself, as trustee, and he sold the shares and delivered the certificate, properly indorsed, to Levy, who lost the same, not having had the stock transferred on the books of the corporation. The plaintiff purchased (as he supposed) the stock, and received delivery of the certificate, for value, in the usual course of business as a stock broker. It was held that the plaintiff acquired no right to the stock.

In the subsequent case of *Winter v. Belmont Mining Company*, 53 Cal. 428, the facts were that Winter was the owner of certain shares of stock, and had them transferred on the books of the company to the name of "M., trustee," who indorsed the certificates in blank, and delivered them to Winter. Subsequently M.

Barstow v. Savage Mining Company.

stole the certificates from Winter and sold them in the market in the ordinary course of business. The court in commenting on the statute providing that shares of stock may be transferred by indorsement and delivery of the certificate, but that the transfer is not valid except as between the parties, until entered on the books of the corporation, and on certain prior cases holding that until such entry the stock may be sold on execution against the person in whose name the stock stood, applied that principle to the case before it of stolen certificates, and held that the purchaser from M., the thief, took a good title. We are not prepared to follow that case (*Winter v. Belmont Mining Company*), in what is said in the opinion regarding the negotiability of certificates of stock; but on the contrary are of opinion that the principle that the thief of the stolen property (it not being money or negotiable securities), can pass no title, should be maintained, unless the facts presented by a case should bring it within the law as stated in *McNeil v. Tenth National Bank*, 46 N. Y. 325; s. c., 7 Am. Rep. 341: "When the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner." Upon referring to the transcript in *Winter v. Belmont Mining Company*, we observe the findings of the court state that Winter delivered his certificates to M. with permission that the latter have the shares of stock transferred on the books and certificates issued to him (M.) for the purpose of enabling the said M. to vote at the then coming election as the owner of said stock." Here was an element upon which perhaps it might properly be held that Winter was estopped from saying, as to an innocent purchaser, the title did not pass; because for one purpose at least, viz., to vote, he had authorized M. to appear to be and act as the owner.

But if the purchaser from one who has not the title, and has no authority so sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit.

In the case at bar, the owner Barstow did not clothe the thief with any apparent power to pass title. The certificates (though properly indorsed), remained in the names of the former owners, and when Rogers purchased he was not dealing with any one who

Barstow v. Savage Mining Company.

had apparent authority from the owner to make a disposition of the stock; he dealt with one having nothing beyond bare possession, which, as said above, does not clothe the possessor with the power of selling.

In conclusion then we are of opinion and decide that where stock of an incorporation stands on the books in the name of A., and the stock is owned by B., and the certificate (though properly indorsed) is stolen from B. without his fault, the thief can pass no title, and B. may pursue his property.

The judgment is reversed and the cause is remanded with instructions to render judgment in favor of plaintiff. But it is not manifest that the plaintiff can have judgment against Rogers for the value of the stock, and also that the incorporation issue new certificates to him; he may have one or the other, as he elects, but not both. It is stated in the findings that the shares represented by certificate No. 25537 have been sold for assessments. Plaintiff being the owner of those shares he should have paid the assessments, and neither Rogers nor the incorporation should be held responsible for his omission to do so.

Judgment affirmed.

MORRISON, C. J., SHARPSTEIN, MCKINSTY and THORNTON, JJ., concurred; ROSS, J., concurred in the judgment.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

WATERS v. REUBER.

(16 Neb. 99.)

Fixtures — building — vendor and purchaser.

A purchaser in possession of land under an oral contract of sale, built a frame house thereon. The vendor afterward repudiated the contract and took possession of the house. *Held*, that the purchaser could maintain replevin for it.*

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

Alfred W. Ages and Austin J. Rittenhouse, for plaintiff in error.

Hainer & Kellogg and P. Likes, for defendant in error.

REESE, J. This was an action of replevin instituted in the County Court of Hamilton county, wherein the defendant in error claimed the possession of "one frame building now in process of erection, size 22x50, with the appurtenances thereto belonging, and of the value of \$350." An order of replevin was issued, but the appraised

* See *Hinkley and Egery Iron Co. v. Black* (70 Mo. 473), 85 Am. Rep. 846, and references.

Waters v. Reuber.

value of the property being more than \$500, the cause was certified to the District Court without further proceedings. In the District Court the defendant in error filed his petition, in which the property in controversy was described as "all the lumber, laths, shingles, nails, joists, boards, and materials on lot number fourteen, in block number seventeen, in the original town of Aurora, Nebraska, at the commencement of this action, and of the value of \$350, and being the same chattels and personal property mentioned and described in the original petition filed in this cause, which petition is hereby made a part hereof."

[Minor question omitted.]

Upon issue joined, the cause was tried to a jury, who returned a verdict in favor of the defendant in error upon the question of the right of property and of possession, and assessed his damages at \$50. A motion for a new trial was made by the plaintiff in error, which was overruled and judgment entered thereon.

[Minor question omitted.]

The next and most important question in this case is as to the right of the defendant in error to maintain this action, it being claimed by the plaintiff in error that the building in question was annexed to the freehold and was not a subject of replevin. Before entering upon an examination of this branch of the case, it seems proper to say that the evidence was to a great extent conflicting. The cause being tried to a jury, it was for them to determine the weight of the testimony, and with their conclusion in that respect we must be content. Again, as to whether or not the building in dispute did become annexed to and a part of the freehold must depend to a very great extent upon the facts of the case and the intention of the parties.

In order to understand the exact point involved, a brief statement of the material facts, as disclosed by the record, is necessary, and which are substantially as follows: Prior to and during the month of March, 1882, the plaintiff in error was the owner of lot 14, block 17, in the town of Aurora. About the first of March of that year the plaintiff in error and the defendant in error had some conversation upon the subject of the purchase of the lot by the defendant in error. The price asked by the plaintiff in error was \$450. About the 20th of March the plaintiff in error left Aurora for Dakota Territory, but before leaving he placed the lot in the hands of W. I. Farley, a real estate agent, for sale, and fixed the

price at \$500, making no reservations or conditions as to whom the lot should be sold. The defendant in error testifies that he purchased the lot of the agent, and the proof on the trial would fully warrant the jury in so deciding. The lot was surveyed and the corner established so that the carpenters might proceed with the work of constructing the building thereon. The surveyor testified in substance that the defendant in error called upon him to make the survey and locate the corners. He and the defendant in error "stepped into Farley's office to ascertain the numbers, and Reuber asked Mr. Farley if it was all right for him to go ahead and survey that, as he wanted to fix the corners before going on and building. Mr. Farley said I have no doubt that it is all right, that the lot was left with them for sale at the price he gave. He said it was all right of course. Farley told Mr. Reuber to let me do the work." The witness further testified that he did the surveying immediately after, and the carpenters were there at work. On the cross-examination he virtually reiterated his testimony in chief, saying, "Reuber said he was already to go ahead on that building on that lot, and wanted to know if it was all right. Mr. Farley said certainly that it was all right, from the fact that the property was left there for sale and not withdrawn. That there would be no difficulty as to that, that there would be no question but that Reuber would get the lot." He also testified that Farley said Reuber would be safe in going on and building on the lot. That the lot had been left with him to sell and it would be safe for Reuber to go on. It is conceded that Farley was the agent of the plaintiff in error and had authority to sell the lot. Under these circumstances the defendant in error took possession of the lot and began the construction of the building in dispute. Farley soon afterward informed him that he (Farley) had no word from the plaintiff in error, and he did not know how about his getting the lot, and it was best for the defendant in error not to go ahead until he could reach the plaintiff in error; he did not know where he was, and he would not guarantee it, but that the defendant in error said he knew it would be all right, that plaintiff in error had offered to sell him the lot before. The defendant in error proceeded with the construction of his building, placing it on stones so laid under the sills as to afford a level and substantial resting place, but in no other way attaching it to the soil. In the latter part of April, 1882, the plaintiff in error returned home from Dakota. The frame of the building had been put up,

Waters v. Reuber.

part of the roof, siding, joists, and flooring had been put on, but the building had not been inclosed. The defendant in error had evidently acted in good faith, fully believing he had purchased the lot and would receive his deed upon the return of the plaintiff in error. In this he was mistaken. The plaintiff in error not only refused to make the deed, but notified the defendant in error that he must stop work and leave the building, that it was his, and that the defendant in error must let it remain there. The defendant in error tried the expedient of removing the house during the night time, but the plaintiff in error appeared and forbade the removal. The replevin was then sued out by the defendant in error.

The first point made by the plaintiff in error is, that "where one person enters upon the land of another, and without the assent and agreement of the land-owner erects thereon a building, it at once becomes a part of the freehold, and belongs to the owner of the soil." The long array of authorities cited in support of the proposition would perhaps deter us from questioning its soundness, were we ever so strongly inclined to do so; but in our view of the case it has no application here. But see *Dietrichs v. Lincoln, etc., R. Co.*, 13 Neb. 47. It is also urged that if the plaintiff in error had been present and known of the erection of the building his mere silence would not have been sufficient to raise a presumption of any assent or agreement on his part. It is not necessary for us to discuss this question either, for he, through his agent, was more than silent. The lot was to all intents and purposes sold to the defendant in error. His entry thereon was not wrongful. He was exercising the right which he had to use his property as he saw fit. Had he so elected, he could have removed his building at any time before the efforts of the plaintiff in error to become its owner, and he would not have been in any degree liable to the plaintiff in error for the value thereof.

In *Little v. Willford*, 31 Minn. 173, the owner of the land executed to parties named in the deed a conveyance, the land conveyed to be held by them as trustees for a church named in the deed. The association, which was represented by the trustees, took possession of the land and erected a church building thereon. It was afterward ascertained that the deed was void and conveyed no title. The church association directed the removal of the church to another site, and the defendants were proceeding to sever and remove it when they were enjoined by the plaintiff Little. It was

held that he had no right to the church and the injunction was dissolved, and VANDENBURGH, J., in writing the opinion of the court says: "As to the plaintiff's rights to the improvements, the defendant's equities are not less strong than they would have been had plaintiff expressly licensed the society to erect a church upon the lot in question. Where the authority of placing a building upon the land of another rests upon his license, and the consideration of the case is uninfluenced by the unreasonable laches of the licensee, or other special circumstances, he is regarded as continuing to be the owner of the building and equitably entitled to remove the same if he elects, and if such removal be practicable and works no serious injury to the land or the premises of the licensor to which it is annexed." See authorities there cited.

The authorities all distinguish between an unauthorized erection of buildings upon the land of another, and improvements made thereon by his consent, as respects the title to the improvements or the beneficial interest therein. Tyler Fixt. 88, 81. Suppose the contract of sale and authority to take possession and construct the building, pending the completion of the contract, had been made by the plaintiff in error and he had afterward refused to execute and deliver the necessary deeds, would the case have been materially different from what it is? We think not. The right to remove buildings under such circumstances is strictly equitable in its nature, but as between the parties it has come to be recognized at law. *Little v. Willford, supra*; 2 Am. Lead. Cas. (5th ed.) 589.

The case of *Rush County v. Stubbs*, 25 Kans. 322, is quite similar to this in many respects. There the plaintiff placed its building upon the land of the defendant upon which he had a homestead filing, with the understanding that he should convey to the plaintiff when he procured his patent from the United States. The building was placed upon a permanent stone foundation, but the agreement with Stubbs was not in writing. Stubbs obtained his patent to the land, but refused to convey to the county and also refused to allow the plaintiff to remove the house. The county replevied the house, and the Supreme Court decided the action could be maintained. BREWER, J., in delivering the opinion of the court used the following language: "The house was placed by the plaintiff upon the land to which the defendant Stubbs had an inchoate title, with the understanding that it should remain the property of the plaintiff. How did the plaintiff lose his title? The

Waters v. Reuber.

manner in which it was annexed to the ground did not prevent the intention of the parties from remaining effective. The building was, it is true, on a stone foundation but it was held there by its own weight. That it could be moved without destruction is evident not merely from the description of the building but also from the fact that it had been once moved.

“The contract of purchase may be laid out of consideration, for it was void and was repudiated by the owner of the realty and it was not intended thereby to affect the ownership of the building.
* * * The intention of the parties made this building personalty, and neither the manner of annexation nor any other matter prevented this intention from being carried into effect. Demand was conceded. Replevin and not forcible entry and detainer is the remedy to recover personal property.”

The act of the agent when acting within the scope of his authority is the act of the principal. Farley was authorized by the plaintiff in error to sell the lot. The authority to sell carried with it the right to put the purchaser in possession. He sold the property to the defendant in error, who, relying on his purchase, made the improvement thereon for himself. The plaintiff in error had not invested a dollar thereon, and to say that he could repudiate the contract made by his authorized agent, and by his repudiation become vested with the title to the property of the defendant in error, is a proposition too monstrous to be entertained by a court of justice.

The plaintiff in error contends that the court erred in giving the first and second instructions asked by the defendant in error. On this proposition it is enough to say, that the instructions complained of were in the line of reasoning presented herein. They fairly submitted the case to the jury, and were correct.

It is next claimed the damages assessed by the jury are excessive, and were given under the influence of passion and prejudice. While the damages found by the jury are perhaps higher than would have been given by the writer hereof, yet there is some testimony from which the jury might have arrived at their conclusion, and the amount is not great enough to suggest passion or prejudice on the part of the jury. There is no error sufficient to reverse the case on that ground.

After a careful examination of the whole case we are driven to the conclusion that substantial justice has been done and that there

Huff v. Ames.

are no errors prejudicial to the plaintiff in error. The judgment of the District Court is affirmed.

Judgment affirmed.

The other judges concur.

HUFF V. AMES.

(16 Neb. 139.)

Negligence — imputable — parent and child.

In an action by an infant for an injury by negligence, the parent's contributory negligence is not imputable to the child.*

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

Battan & Ragan, for plaintiff in error.

Tanner & Capps, for defendant in error.

RESE, J. The plaintiffs in error employed the defendant in error to labor for them in and about a cane-mill, while engaged in crushing sugar cane. The defendant in error was a boy of the age of eleven years, and while feeding the mill his hand was caught between the rollers and so severely injured as to require the amputation of two of his fingers. This action was instituted by him, through his next friend, for damages resulting from the alleged carelessness of the plaintiffs in error in requiring him, at his age, to feed the cane-mill, that being a dangerous employment.

Upon the trial the plaintiffs in error requested the court to give a number of instructions, a part of which the court refused to give, to which refusal the plaintiffs in error excepted. The jury having returned a verdict in favor of the defendant in error and a motion for a new trial having been overruled, the plaintiffs in error bring the case into this court for review.

* To same effect, *G. H. and H. Ry. Co. v. Moore* (59 Tex. 64), 46 Am. Rep. 265. See *McGary v. Loomis* (68 N. Y. 104), 20 Am. Rep. 510; *Fitzgerald v. St. Paul, etc. R. Co.* (29 Minn. 336), 43 Am. Rep. 212.

Huff v. Ames.

[Minor points omitted.]

The tenth instruction requested by the plaintiff in error and refused by the court was really objectionable. In it the plaintiff sought to have the jury instructed that if they found "that the employment to which the plaintiff was hired was a dangerous one and the said father was guilty of negligence in so hiring said plaintiff to said work, and that the plaintiff received his injury by reason of said dangerous employment, but without fault or negligence of defendants, but by the carelessness of plaintiff himself, then the plaintiff cannot recover in this suit. The weight of authority is that the negligence of the parent, guardian or other person lawfully in custody of a child which is injured, will be imputed to the child so as to bar a recovery of damage."

That the doctrine stated in the last clause of this instruction is held to be the law by some writers and many courts of last resort may be true, but we think the weight of authority and the better rule to be the reverse, and that the rule is now established, that in an action by the infant for damages resulting from an injury to himself by the negligence or want of care of a third party, the negligence of the parent or guardian is not to be considered or imputed to the infant. *Daley v. Worcester, etc., R. Co.*, 26 Conn. 591; *Bellefontaine, etc., R. Co. v. Snyder*, 18 Ohio St. 399; *Cleveland, etc., R. Co. v. Manson*, 30 id. 451; *North Penn. R. Co. v. Mahoney*, 57 Penn. St. 187; *Whirley v. Whittemore*, 1 Head, 620; *Government Street R. Co. v. Hanlan*, 53 Ala. 70; *Norfolk, etc., R. Co. v. Ormsby*, 27 Gratt. 455; *Hatfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273. But when the parent sues for loss of services sustained by an injury to the child, then the contributory negligence of the parent may be a bar. *Gleassy v. Hestonville, etc., R. Co.*, 57 Penn. St. 172; *Louisville, etc., Canal Co. v. Murphy*, 9 Bush, 522.

Objection is made to the seventh instruction given by the court on its own motion, but as this instruction states the law as it is stated in the foregoing, we think it not necessary to notice it any further.

No error appearing upon the record, the judgment of the District Court is affirmed.

Judgment affirmed.

The other judges concur.

Chicago, St. Paul, Minneapolis and Omaha Railway Company v. Swanson.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY V. SWANSON.

(16 Neb. 254.)

Master and servant — fellow-servant — conductor and laborer.

The conductor of a railway construction train and a gang of day laborers employed in such construction and under his orders are not fellow-servants.*

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The plaintiff had judgment below.

John D. Howe, T. M. Marquett and John C. Spooner, for plaintiff in error.

Thurston & Hall and Parrish & Lewis, for defendant in error.

COBB, C. J. [Omitting other points.] The second point made by counsel is upon the instructions given by the court to the jury on the trial. The instruction specially objected to and relied upon as error by plaintiff in error in its brief, was in the following language :

“Ordinarily, an action cannot be maintained by an employee of a person or corporation against the employer for an injury received through the negligence of another employee engaged in the same common service. * * * If you find that Carnes had control and direction of the men who were engaged in cleaning the track, and widening the cut through the snow at the place where the injury was received ; that the men were bound by the terms of their service to obey the orders of Carnes ; that at the time and under the circumstances it was attended with unusual and peculiar danger and hazard to work in the cut, on account of the approaching train ; that Carnes knew this and had the power, authority, and means to cause timely warning to be given to the men of the proximity and approach of the train ; that they expected and relied on him to do so ; that he failed to do so ; and in consequence thereof the deceased was run over and killed, this was negligence for which the railroad company was responsible.”

It appears from the bill of exceptions that the decedent of the

* See *Moon's Adm'r v. Richmond, etc., R. Co., ante*, 401.

Chicago, St. Paul, Minneapolis and Omaha Railway Company v. Swanson.

defendant in error, the deceased, was engaged as a laborer in the employment of a railroad company. He was one of a gang of men attached to a construction train whose business at that season of the year was to clear off the accumulations of snow from the railroad track. One Carnes was the conductor of the train, and boss of the men and of the work in which they were engaged. He had hired most or all of them to work for the company. On the morning of the day of the accident, this gang of men, consisting of fourteen men beside Carnes, the boss and conductor, left Oakland, and proceeded north with the train to Middle Creek Station, or turn out. Here, after placing the train on the side track, the conductor with his gang of men commenced working back south clearing out the snow from the track. After completing this work through one cut of lesser dimensions, they entered the one where the fatal accident occurred. This is a cut of some four hundred feet in length, from ten to fifteen feet in depth in the center, and gradually sloping to or near a level at each end. After working through the cut at what the witnesses call flanging, and describe as cleaning the snow off of the inner surface of the rails, and having arrived at the south end of the cut, the men were ordered by Carnes, the conductor and boss, to return to the center of the cut and widen the channel through the snow, which was barely wide enough to permit trains to pass. The sides of this channel were nearly or quite perpendicular, and the snow hard. A portion of the men had reached the center of the cut and commenced work widening the channel, and some of them had not yet arrived at that point, when some of the latter discovered a train of cars coming around a slight curve which exists at or near the north end of the cut. This proved to be the regular south-bound passenger train, about nine minutes behind time, and running at a speed of twenty-five miles per hour. Eight of the men nearest the south end of the cut, and Carnes, who was also near the south end, succeeded in getting out. Six men, who had got to work near the center of the cut, including defendant in error's decedent, were run over and killed.

The questions then presented to this court by this branch of the case are, was the law correctly stated in the above instructions? And was it properly applicable to the facts as shown by the bill of exceptions? And they must both be answered in the affirmative.

The deceased was in the employment of the railroad company.

Chicago, St. Paul, Minneapolis and Omaha Railway Company v. Swanson.

in the lowest grade of service, a day laborer. To him Carnes represented the company with all of its authority and power. It was not for him to question the propriety or timeliness of any order coming from this source, unless its execution would carry him into palpable physical danger. Carnes, the conductor of the construction train as well as boss of the gang of men, of course carried a watch regulated by some standard of time common to the entire road. It was his duty, on whatever section of the road he might be with his train or gang of men, to know when any regular train was due at that point. The deceased doubtless carried no chronometer. Had he carried one it would have been regarded as an impertinence on his part to have claimed the right to regulate his work by it. So that while it was his duty to go into the center of the cut and go to work when ordered by Carnes, it was gross negligence on the part of Carnes to order him there just as the train was due at that point. This was not only negligence on the part of Carnes, but it was negligence on the part of the railroad company whose vice-principal he was, and which could alone discharge its duty to this employee on this occasion through him.

It is not deemed necessary, nor does the time at my command admit of my going through and comparing the cases cited on either side as to the right of a servant to recover from the master for injuries received by him through the negligence of an overseer or upper servant placed over him by the master. While I had supposed the law to be pretty well settled on this subject, the earnest claim of counsel at the hearing almost induced me to doubt whether the rule, as formerly held in Ohio, had not been departed from or essentially modified even in that State. But I find upon examination that such is not the case, and that that which is held in the case of *Little Miami Railroad Company v. Stevens*, 20 Ohio, 415, in 1851, is substantially held in all the cases up to and including *Railway v. Lavalley*, 36 Ohio St. 221, in 1880. I think the rule is best stated by Judge RANNY in the case of *Railroad Co. v. Keary*, 3 Ohio St. 201, in the following language: "It seems to us clear in a case like the present, that as between the company and those employed to labor in subordinate situations under the control of a superior, two distinct classes of obligations arise, the one resting on the company, and the other upon the servants, and both founded upon what each, either expressly or impliedly, has agreed to do in the execution of the contract. It is the duty of the com-

Farrell v. Cook.

pany to furnish suitable machinery and apparatus, and as they reserve the government and control of the train to themselves, and intrust no part of it to these servants, to control it and them with prudence and care. As the necessity of this prudence and care is constant and continuing, the obligation is performed only when it is constantly exercised, and they cannot rid themselves of it by devolving this power upon the conductor. If they intrust him with its exercise, in the language of Judge STORY, they in effect warrant his fidelity and good conduct. It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. If they fail to do this, and injure each other, they violate their engagements to the company, and are alone answerable for the wrongs they do. In such case there is no failure of the company to do what as between them and these servants it was understood they should do, when the servants entered the service. But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employers gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

I think the law thus established and laid down in Ohio prevails substantially throughout the western States and will ultimately prevail everywhere.

The judgment of the District Court is affirmed.

Judgment affirmed.

The other judges concur.

FARRELL V. COOK.

(16 Neb. 483.)

Nuisance — injunction — keeping of jacks and stallions.

The keeping of jacks and stallions and standing them for mares near and in plain view of an inhabited dwelling-house may be prohibited by injunction.*

ACTION to abate nuisance. The opinion states the case. The plaintiff had judgment below.

* See *Marsan v. French* (61 Tex. 173), 48 Am. Rep. 272, and note, 274.

G. R. Chaney, for plaintiff in error.

Cass & McNeny, for defendant in error.

MAXWELL, J. This action was brought in the District Court of Webster county to abate a nuisance. A demurrer to the petition was overruled in the court below and a perpetual injunction granted.

The grounds of the demurrer are: 1st. That the plaintiff has not legal capacity to sue; and 2d. That the facts stated in the petition are not sufficient to constitute a cause of action.

It is alleged in the petition that in May, 1880, the defendant in error (the plaintiff below) "became and ever since has been and now is the owner of lots 7, 8, 9, in block 25, in the town of Red Cloud; that the plaintiff has erected on said lots a dwelling-house of the value of \$1,000 and otherwise improved said premises, and that he resides in the dwelling-house aforesaid with his family, and has so resided since the month of June, 1880; that his family consists of his wife, two daughters and one son; that in February, 1884, the defendant (plaintiff in error), John Farrell, purchased lots 16, 17, 18 and 19, in block 26, in said town of Red Cloud, and has since occupied the same; that said lots are directly across the street in front of the dwelling of the plaintiff above mentioned, in full view thereof, and not more than one hundred feet from said dwelling; that soon after the defendant purchased said lots he began to use and permit others to use the same as a place for standing stallions, jacks and other animals; that the defendant is the owner of a feed stable, which is situated on a portion of said lots, and permits and hires out that portion of said lots not covered by said stable for the uses and purposes aforesaid; that owners of various horses and jacks are, with the consent and permission of defendant, using and occupying said premises as a place for putting jacks and stallions to mares, in full view of plaintiff's said dwelling and to the great inconvenience and discomfort of the plaintiff and his family," etc.

[Omitting a minor question.]

A nuisance may be defined as whatever is injurious, offensive to the senses, indecent or an obstruction to the free use of property so as materially to interfere with the comfortable enjoyment of life or property. *Regina v. Gray*, 4 Fost. & Fin. 73; *State v. Purse*,

Farrell v. Cook.

4 McCord, 472; *Nolan v. Mayor*, 4 Yerg. 163; *Pickard v. Collins*, 23 Barb. 444-453; *Hackney v. State*, 8 Ind. 494; *State v. Taylor*, 29 id. 517; 4 Wait Act. and Def. 727. It is any thing that unlawfully worketh hurt, inconvenience or damage. 3 Bl. Com. 216; 2 Bouv. Law Dict. 245; *Com. v. O. C. R. Co.*, 14 Gray, 93; *Coker v. Birge*, 9 Ga. 425. It is a term applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to the right of another or of the public, and producing such material annoyance, inconvenience, discomfort or hurt, that the law will presume a consequent damage. Wood Nuis., § 1. There must not only be a violation of a right, but an essential inconvenience, annoyance, or discomfort must result therefrom. Id., § 9. A party is entitled to the free use and enjoyment of his own property but he must so use it as not to interfere with the rights of others. Enjoy your property in such a manner as not to injure that of another person, is the maxim of the law. That the plaintiff in error has violated this rule is clearly shown by the petition, and also that the defendant in error has sustained special injury by such violation.

In *Hayden v. Tucker*, 37 Mo. 214, it was held that the keeping and standing of jacks and stallions within the immediate view of a private dwelling was a nuisance; so too the keeping of a brothel near one's dwelling. *Hamilton v. Whitridge*, 11 Md. 128. We have no doubt that the plaintiff below is entitled to an injunction as prayed for in his petition.

The demurrer therefore was properly overruled and injunction granted. The judgment is affirmed.

Judgment affirmed

The other judges concur.

Sioux City and Pacific Railroad Company v. Finlayson.

SIoux CITY AND PACIFIC RAILROAD COMPANY v. FINLAYSON.

(16 Neb. 578.)

Trial — physical examination of plaintiff.

On the trial of an action of damages for a personal injury, the court may refuse to order the plaintiff to submit to a physical examination by the defendant's medical witnesses, in private, it not appearing to be necessary, and the plaintiff having already submitted to an examination by such witnesses in the presence of the jury. (*See note, p. 726.*)

ACTION for personal injury by negligence. The opinion states the point. The plaintiff had judgment below.

Joy, Wright & Hudson and *L. W. Osborn*, for plaintiff in error.

George W. Doane and *Ballard & Walton*, for defendant in error.

REESE, J. This is an action against the plaintiff in error, the Sioux City and Pacific Railroad Company, for damages resulting from a personal injury caused by the explosion of an engine of said company, and on which defendant in error was at the time engaged and employed as an engineer. The petition alleges that the engine became and remained defective and dangerous through the negligence of the plaintiff in error. The answer of plaintiff in error admitted the explosion of the boiler on the engine, but denied all negligence or carelessness of the company; denied that the plaintiff had received the injuries as stated, and averred that the explosion was caused by the contributory negligence of the defendant in error.

There was a jury trial which resulted in a verdict of \$9,250 in favor of defendant in error.

[Omitting other points.]

The record shows that after the defendant in error had introduced all his testimony on the trial, and had rested his case, the "defendant (plaintiff in error) moved the court to direct the plaintiff to allow the physicians called on the part of the defense to make an examination of his person with reference to his alleged injuries, for which he now seeks to recover. The court ruled that it had no

Sioux City and Pacific Railroad Company v. Finlayson.

power to make such an order, to which ruling defendant excepts." Error is assigned in this court based upon this record.

If such examination was proper to be made, and if the defendant in error upon application had refused to allow it to be done, we are inclined to believe the court had the power to make and enforce such an order. It is fundamental that if a decision or ruling of a court is correct, the fact that the reason assigned therefor by the court, when making it, is not sufficient to sustain the order, the fact of such deficient reason being given will not vitiate the ruling or order. The question now before us is, did the court err in its refusal to make the order requested? We think not. It is not the province of courts to make useless and unnecessary orders, simply because they are so requested. There was no showing made to the court that permission to make the examination had been refused by defendant in error, nor that any such permission had been requested. There is no showing of any kind that such examination was necessary in order to aid plaintiff in error in making its defense, indeed there was no intimation made that any good could possibly result or benefit be derived from such an examination. The request was made in the midst of the trial. The court was asked to stop the trial and send out the plaintiff in the suit for examination. Again, this request hardly possessed all the elements of fairness. The court was asked to virtually place the defendant in error in the hands of the defense. It was not sought to have the examination made by disinterested and unbiased surgeons whom the parties might select or the court appoint, but by the "physicians called upon the part of the defense." Again, the record shows that when the witnesses on the part of the defense were placed upon the stand to testify upon the question of the alleged injury, the defendant in error was asked to "step forward and allow the witness to examine him," which he did. The record further shows that the defendant in error was "asked to remove his coat and vest, which he does, and the witness examines the back, sides, and other portions of the body of the plaintiff; also as to his breathing; also the condition of the eyes, the muscles of the leg, the condition of the tongue and of the pulse." From this it must seem that even if the court had erred by its refusal to make the order, that error was cured by the examination made by consent of defendant in error. The only case cited by plaintiff in error in support of its position is *Schroeder v. C., R. I. and P. R. Co.*, 47 Iowa, 375. But there is a wide distinc-

Sioux City and Pacific Railroad Company v. Finlayson.

tion between that case and this. In that case the request was made after the jury was impanelled, but before any of the testimony was heard. The application was in writing, and requested the examination to be made by a "proper number of physicians, to be selected, in equal numbers, by plaintiff and defendant, and it was proposed by defendant that its own medical officer should not be one of the number, * * * and in support of this application the affidavit of a surgeon and physician in the employment of defendant was filed, stating that he had professionally attended plaintiff immediately after he was injured, and had made personal observation of plaintiff's condition, and had heard his testimony at the former trial, and it was his belief, based upon these means of knowledge, that his injuries were not of the character claimed by him and that the truth of the matter could be ascertained by a proper personal examination of the plaintiff." It also appears in that case that an effort was made to procure an examination of plaintiff in the presence of the jury, as was done in this case, but the plaintiff refused to submit to it, and the court would not order it, and that, too, after the plaintiff had testified that his back and internal organs were affected by the injury, and that "one of his legs was disabled to an extent that deprived him of its full use, and that he thought it appeared to be smaller and somewhat shrunken." Our attention has been called to no other case upon this subject, and we know of no other holding as the Iowa case. As to the soundness of the position taken by that court we have nothing to say. The question is not before us. It is enough to say that under the authority of that case it cannot be made to appear that the ruling of the court in this case was erroneous, or that it abused its discretion in refusing to make the order sought.

Believing that the verdict is excessive, the judgment and decision of this court is, that the judgment of the District Court be set aside and a new trial granted, unless the defendant in error enter a remittitur of the sum of \$3,000 within thirty days from this date. If such remittitur is filed, the judgment to the extent of \$6,250 will be affirmed.

Judgment accordingly.

The other judges concur.

NOTE BY THE REPORTER. — See *Atchison, etc., R. Co. v. Thul*, 29 Kans. 466; 8 C., 44 Am. Rep. 659; also, note, *ante*, 191. In *Schroeder v. C., R. I. and P. R. Co.*, 47 Iowa, 875, the court said: "To our minds the proposition is plain that

Sioux City and Pacific Railroad Company v. Finlayson.

a proper examination by learned and skillful physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. *

“It is said that the examination would have subjected him to danger of his life, pain of body and indignity to his person. The reply to this is that it should not, and the court should have been careful to so order and direct. Under the explicit directions of the court, the physicians should have been restrained from imperiling, in any degree, the life or health of the plaintiff. The use of anæsthetics, opiates or drugs of any kind should have been forbidden, if, indeed, it had been proposed, and it should have prescribed that he should be subjected to no tests painful in their character. As to indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies. Those who effect insurance upon their lives, pensioners for disability incurred in the military service of the country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examinations of their bodies, and it is never esteemed a dishonor or indignity. The standing and character of the physicians who should have been appointed to make the examination would not only have secured plaintiff from insult and indignity, but would have been a guaranty that nothing would have been attempted which would have endangered his life or health.

“We have been able to find no case in which the question before us has been considered, and we have been referred to no authority by counsel that seems to have much application thereto. The courts have held in divorce cases, when the impotency of a party is in question, an examination may be ordered of the person alleged to be impotent. See 2 Bish. Mar. and Div., § 596 *et seq.*, and notes. The foundation of this rule is the difficulty of reaching the truth in any other way than by an examination of the person. The authorities referred to may be regarded as giving some support to our conclusion.

“It is the practice of the courts of this State, sanctioned by more than one decision of this court, to permit plaintiffs who sue for personal injuries to exhibit to the jury their wounds or injured limbs, in order to show the extent of their disability or suffering. If, for this purpose, the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case and under proper circumstances, be required to do the same thing for a like purpose upon the request of the other party. If he may be required to exhibit his body to the jury, he ought to be required to submit it to examination of competent professional men.”

In *Hatfield v. St. Paul and D. R. Co.*, Supreme Court of Minnesota, January, 1885, the plaintiff having testified that the injury in question had rendered her lame, and caused her to limp in walking, the counsel for defendant requested the court to direct her to walk across the court-room in presence of the jury, which the court declined to do. The court said: “As the object of

Sioux City and Pacific Railroad Company v. Finlayson.

all judicial investigations is, if possible, to do exact justice and obtain the truth in its entire fullness, we have no doubt of the power of the court in a proper case to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries. This is in accordance with analogous cases in other branches of the law. When a view of real estate will aid the jury in reaching a conclusion, it is within the discretion of the court to permit it. When an inspection of an article of personal property will aid them, it is not infrequent to cause the article to be brought into court for the same purpose. *Line v. Taylor*, 8 Fost. & F. 731; *Lewis v. Hartley*, 7 Carr. & P. 405. The practice in patent and in certain equity cases, of allowing tests to be applied before the court, is somewhat analogous in principle. So is the practice of divorce courts, of ordering an examination of the person of the party in certain cases.

"It is a common practice to allow plaintiffs, in actions for personal injuries, to exhibit to the jury their wounds in order to show their extent, or to enable a surgeon to demonstrate their nature and character. This has been held proper. *Mulhado v. R. Co.*, 80 N. Y. 370. If for these purposes a plaintiff may exhibit his injuries, there would seem to be no reason why under proper circumstances he may not be required to do the same thing, for a like purpose, upon request of the defendant. In some cases it has been held that a party may be required to submit to an examination by competent professional men for the purpose of ascertaining the nature and extent of his injuries. *Schroeder v. R. Co.*, 47 Iowa, 375; *R. Co. v. Thul*, 29 Kans. 466; s. c., 44 Am. Rep. 659. From analogy to such cases we conclude that a court has the power, in a proper case and under proper circumstances, to direct the plaintiff to do a physical act in presence of the jury that will illustrate or show the character of his injuries. And we are by no means prepared to say that there may not be circumstances where the defendant would have a right to such an order. but it is evident, from the very nature of things, that the propriety of such an order must usually rest largely in the discretion of the trial court, and it would only be in case of a plain abuse of such discretion that we would interfere. In the present case we think the court very properly refused to direct the plaintiff to exhibit herself to the jury and by-standers by walking across the room. Such an act would have furnished the jury little or no aid in determining the extent or character of her injuries. The only fact it could by any possibility have determined was whether or not she was lame or "limped," as she testified, in walking. But there was already ample and uncontradicted evidence of this fact. Her own evidence on the point was fully corroborated by that of three or four other witnesses, her neighbors or members of her family, who had seen her almost daily since the accident."

In *White v. Milwaukee City Ry. Co.*, Wisconsin Supreme Court, November, 1884, during the trial, counsel for the defendant made the following request, and the following proceedings were thereupon had: "*Defendant's Counsel*—We ask of the court to direct the plaintiff, who is now present, to submit her limb for examination in a private room attached to the court-room, privately, to Drs. Denn and Hare, who are now present, and that if she wish she can be accompanied by any of her own female friends who are present, or any other

Sioux City and Pacific Railroad Company v. Finlayson.

physician whom she chooses. *Court* — I do not see any thing improper in the request, but I do not think I have any authority to compel a suitor to submit, in a case of this kind, to any examination against his or her will; I therefore refuse the application. Plaintiff's counsel says: 'The plaintiff herself declines to have the examination in the absence of her physician, who, as her attorney is informed and believes, has left the city since she has been on the witness stand.'" The court said on appeal:

"It will be seen that the court denied this request on the sole ground that he had no authority to compel the plaintiff to an examination against her will. On principle and authority we are satisfied that this was error. The then condition of the injured limb had a most important bearing upon the question as to whether the plaintiff's injuries were permanent, and an examination at that time, the results of which would have been put in evidence before the jury, would in all probability have greatly aided them in determining the extent and consequences of the injury. It would or might have been more satisfactory and conclusive evidence on that subject than the statements of the plaintiff, or the opinions of the medical witnesses. The application for her examination contained in it every reasonable safeguard against offending the modesty or delicacy of the plaintiff, and although she might shrink from the examination, yet the ends of justice imperatively demanded that she submit to it. Such examinations are frequently ordered by courts in cases of divorce for impotency, and in cases of alleged pregnancy, and the authority of the court to order them has never been questioned, so far as we are advised. In *Walsh v. Sayre*, 52 How. Pr. 334, the power of the court in a proper case to order a personal examination is asserted, and it is there said that it rests upon the same principle as does the power to compel the discovery of books, papers and documents, the difference being that in a case like this the principle extends to things or substances as well. *Schroeder v. C., R. I. and P. Ry. Co.*, 47 Iowa, 375, is to the same effect. The opinion of BECK, J., in that case, and of JONES, J., in *Walsh v. Sayre*, *supra*, contain very able and satisfactory discussions of this question. It is said by the learned counsel for the plaintiff that it rests in the sound discretion of the court to order or refuse an examination. Perhaps it does. But that discretion has not been exercised here. The court expressly denied the application because of alleged want of power to grant it. We hold that in a proper case the court has power to order an examination, and that this is a proper case in which to exercise it."

In *Walsh v. Sayre*, 52 How. Pr. 334, a case of malpractice, the court ordered that the plaintiff be required to appear and submit to a personal examination of the affected part by the defendant and such other skillful and competent surgeons as he might name, under the direction of a referee appointed by the court for that purpose. Approved, *Shaw v. Van Rensselaer*, 60 How. Pr. 143.

In *Roberts v. Ogdensburgh and Lake Champlain R. Co.*, 29 Hun, 155, it is held that in an action of damage for personal injury by negligence, the court has no power to order the plaintiff to submit to surgical examination of her person, and answer questions touching her sensations. The court disapproved *Walsh v. Sayre*, 52 How. Pr. 334; *Shaw v. Van Rensselaer*, 60 id. 143:

Sioux City and Pacific Railroad Company v. Finlayson.

Schroeder v. Chicago, etc., R. Co., 47 Iowa, 875 ; and distinguished the doctrine of *Devanbagh v. Devanbagh*, 5 Pa. 554, an action for divorce on the ground of impotency. After specially condemning the order as to oral examination, the court, by LEARNED, P. J., observed : " But again, passing over such cases as that of *Devanbagh v. Devanbagh*, we know of no right which this court has to compel a party to submit to any bodily examination. In a common-law action like this the jury are to pass on the issues of fact. And they are entitled to see and hear for themselves the evidence. It is of the very essence of the common-law system that the evidence shall be produced before the jury. Exceptions to this rule (and not desirable exceptions) are those cases in which evidence is previously reduced to writing, and then read to the jury. Now if a party is entitled to the compulsory exhibition of the body of his opponent, it would seem to follow that he might have such exhibition made before the jury. And the court might require the plaintiff, on the trial and before the jury, to submit to the same examination as is required by this order. *Newman v. Third Ave. R. Co.*, 50 Supr. Ct. Rep. 412. It is undoubtedly true that not unfrequently plaintiffs, suing for bodily injuries, do exhibit in court the injured part. Nor do we know of any reason why they should not do this ; notwithstanding the exhibition may excite sympathy. And on the other hand, all unreasonable concealment of an injured part (not justified by any dictate of modesty or otherwise) may excite a doubt in the mind of the jury as to the genuineness or extent of the alleged injury. But we cannot admit the principle, that either in the presence of the jury, or in the presence of a referee, a party can compel his opponent to exhibit his body in order to enable physicians to examine and question and testify. * * * There may be danger that in actions of this nature plaintiffs will exaggerate the injuries they have received ; and that defendants may be at a disadvantage in ascertaining the exact truth. But this evil is far less than the adoption of a system of bodily, and perhaps immodest, examinations, which might deter many, especially women, from ever commencing actions, however great the injuries they had sustained."

In *Page v. Page*, 51 Mich. 88, a divorce case, the court said : " There was also a most extraordinary compulsory examination of defendant by physicians, who stripped him and subjected him to oral inquisition, to compel him to give evidence which they could repeat before the commissioner for use against him. What means they could be supposed to have for compelling him to answer their questions, in case he declined as he ought to have done, we do not know ; but we are certain they could not be means known to the law. We strike from the record all the evidence obtained by this inquisition also. It should be understood that there are some rights which belong to man as man and to woman as woman which in civilized communities they can never forfeit by becoming parties to divorce or any other suits, and that there are limits to the indignities to which parties to legal proceedings may be lawfully subjected."

CASES
IN THE
SUPREME COURT
OF
INDIANA.

BISHOP V. MOORMAN.

(98 Ind. 1.)

Injunction — against levying on land.

The owner of lands may have an injunction prohibiting the sheriff from levying thereon an execution issued in an action to which he was not a party.

ACTION for injunction. The opinion states the case. The injunction was denied below.

D. T. Taylor, J. M. Smith, and T. Bailey, for appellant.

J. M. Haynes, W. A. Thompson, and J. W. Thompson, for appellees.

ELLIOTT, C. J. The complaint of the appellant alleges that the sheriff is about to levy upon lands owned by him an execution issued upon a judgment rendered against other persons, and in an action to which he was not a party. The prayer is for an injunction restraining the sheriff, one of the appellees, from selling the land.

The appellant contends that his land cannot be sold upon a judgment and execution against other persons, and that he is entitled

to an injunction restraining the sheriff from selling, for the reason that the sale would cast a cloud upon his title. The appellees' position is that no case for injunction is made because the sale would be void, and a void sale would not cloud the title.

It is perfectly clear that the appellant's land cannot be sold to pay somebody else's debt, but it does not follow from this that he has no right to enjoin the sheriff from selling his land. There can be but little, if indeed any doubt at all, that under our decisions a case is made for an injunction, for they uniformly hold that a land-owner may restrain an officer from doing, under color of official authority, an act that may injure the marketable value of his title by clouding it. This principle has found most frequent application in cases of threatened sales for taxes, and the uniform ruling in such cases has been that a sale of tax absolutely void will be enjoined. *Greencastle Tp. v. Black*, 5 Ind. 557; *Riley v. Western Union Tel. Co.*, 47 id. 511; *Abbott v. Edgerton*, 53 id. 196; *City of Delphi v. Bowen*, 61 id. 29; *Morrison v. Bank of Commerce*, 81 id. 335; *Toledo, etc., R. Co. v. City of Lafayette*, 22 id. 262; *Hamilton v. Amsden*, 88 id. 304; *Eversole v. Cook*, 92 id. 222; *Goring v. McTaggart*, id. 200. We have a great number of cases holding that void assessments for ditches, gravel roads, and the like, may be enjoined, and there are many cases holding that the enforcement of a void judgment may be prevented by injunction. It is impossible to distinguish in principle between cases of the character to which we have referred and such a case as the present, and they should be regarded as decisive of the question here at issue, but we have cases even more closely resembling the present. In *Shaw v. Williams*, 87 Ind. 158; s. c., 44 Am. Rep. 756, it was held that a sale upon an illegal notice might be enjoined; and in *Dyer v. Armstrong*, 5 Ind. 437, it was said: "Sales may be restrained in all cases, where they are inequitable." An injunction will lie to restrain the collection of a judgment obtained without notice. *Grass v. Hess*, 37 Ind. 193.

The sale of land under color of judicial process is more than a mere fugitive trespass; it is the assertion of a permanent right to the land and a full denial of the owner's title, and the rule is that where there is an assertion of a permanent right to land the owner may maintain injunction if the right asserted is unfounded. *Erwin v. Fulk*, 94 Ind. 235; *Kyle v. Board, etc.*, id. 115. An assertion of a right to seize land when made under color of official

authority clouds title, and it has always been a well recognized equity doctrine that injunction will lie to prevent clouds from being cast upon an owner's title. It is true that there are decisions of other courts holding that where the act though done under color of authority is void, no cloud is created, and therefore injunction will not lie; but the theory of our cases has always been that a void act, when done under apparent legal authority, does cloud title. This rule is supported by weighty authority and is a reasonable one. It cannot be doubted that a man's title is, as to its marketable value, injured by the deed of a sheriff conveying it to some one else, and a man having a title is entitled to it in all its vigor and value. No reason in law or morals can be found that will justly support the position of one who resists an injunction, where he concedes he is acting under color of authority, but in fact has none and is using that authority to seize and sell without right, or the semblance of justification, the land of another. No one we suppose doubts that a property owner may quiet his title against an apparent claim, though it be never so empty, and if he may do this, surely he may by injunction prevent that apparent claim from clouding his title, without delaying until it has assumed that shape.

An able author has given this subject careful consideration and he fully sustains the doctrine which has found favor from this court. In speaking of the opposite view he says: "While this doctrine may be settled by the weight of authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily, in courts, of defendants urging that the instruments under which they claim are void, and therefore that they ought to be permitted to stand unmolested; and of judges deciding that the court cannot interfere because the deed or other instrument is void; while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value; and the judge himself, who repeats the rule, would neither buy the property thus affected nor loan a dollar upon its security. This doctrine is in truth based upon a mere verbal logic, rather than upon considerations of justice and expediency." 3 Pomeroy Eq., § 1399.

It is argued that the appellant's legal remedy is perfect and complete, and therefore he has no right to ask the assistance of a court of equity. This entire argument rests on an undue assumption.

Bishop v. Moorman.

The law using that term in a limited sense and as opposed to equity furnishes no remedy for quieting title. One in possession could secure a decree quieting title only from a Court of Chancery and never from a court of law; in such cases no remedy at all was obtainable from the common-law courts. An action of trespass might give damages, but it could not clear title. There is therefore no adequate legal remedy. The rule upon this subject is thus stated by the Supreme Court of the United States: "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity."

Watson v. Sutherland, 5 Wall. 74. In many cases this rule has been adopted and enforced by this court. *English v. Smock*, 34 Ind. 115; s. c., 7 Am. Rep. 215; *vide* opinion, p. 124; *Elson v. O'Dowd*, 40 Ind. 300, *vide* opinion, p. 302; *Clark v. Jeffersonville, etc., R. Co.*, 44 id. 248; *Thatcher v. Humble*, 67 id. 444; *Spicer v. Hoop*, 51 id. 365, see p. 370; *Bonnell v. Allen*, 53 id. 130. The principle involved in the rule stated has been carried much farther than it is necessary for us to carry it in this case. Thus it has been held that an injunction will lie to restrain the enforcement of a judgment shown by the record to have been annulled. *Rickets v. Hitchens*, 34 Ind. 348. So it has been held that a sale upon a judgment satisfied of record will be enjoined. *Bowen v. Clark*, 46 Ind. 405. A tenant by entirety may enjoin sale upon a judgment against his co-tenant of the land owned jointly, although the record discloses the character of the title and the nature of the judgment. *Hulett v. Inlow*, 57 Ind. 412; s. c., 26 Am. Rep. 64; *Davis v. Clark*, 26 Ind. 424.

The sale of property not subject to execution, as for instance, the property of a municipal corporation, may be enjoined. *President, etc., v. City of Indianapolis*, 12 Ind. 620; *Lucas v. Board, etc.*, 44 id. 524, 553. Of the class of cases just mentioned it may be said that the record much more clearly discloses the fact that no title can pass than in such a case as this, for in the first named class of cases, a public law notifies the world that no title can pass by the sale, and there is therefore a much stronger application of the rule in such cases than is required in this. In the case of *First National Bank v. Deitch*, 83 Ind. 131, the court quoted, with approval from a work on injunctions, the following: "And it may be asserted as a general proposition, that a sale of lands

Bishop v. Moorman.

under execution which would confer no title upon the purchaser, and whose only effect would be to cloud the title of others, will be enjoined." 1 High Inj. 242. In view of the cases we have cited, we cannot perceive that there can be any doubt that the controlling question in this case has been set at rest in this State.

Looking to the decisions of other courts, we shall find that our cases are not without firm support. *Key City, etc., Co. v. Munsell*, 19 Iowa, 305, the case was in all material respects precisely like that under discussion, and it was held that injunction was the appropriate remedy. The opinion in that case was written by Judge DILLON, and makes clear the right there adjudged the plaintiff. The Supreme Court of California, in *Hickman v. O'Neal*, 10 Cal. 292, said: "The right of a party to enjoin a sale of his property for another's debt is not denied, and is supported by several decisions of this court." We refer, without comment, to the following cases as sustaining our views: *Bank v. Schultz*, 2 Ohio, 471; *Norton v. Beaver*, 5 id. 178; *Bennett v. McFadden*, 61 Ill. 334; *Vogler v. Montgomery*, 54 Mo. 577; *Uhl v. May*, 5 Neb. 157.

The case of *Cartright v. Briggs*, 41 Ind. 184, is not in point, for the facts are essentially different from those before us. In that case the main point of the decision is that the plaintiff had no title to the land which he sought to prevent the auditor from selling. The decision in *Trueblood v. Hollingsworth*, 48 Ind. 537, in so far as it is in point at all, is against rather than for the appellees; for the clear implication from it is, that a sale in such a case as this may be enjoined; but the point really decided in that case was, that the complaint was insufficient because it did not state such facts as gave color of authority to make the sale, and only alleged "empty threats." When the case cited was again before this court, it was expressly held that injunction would lie. *Hollingsworth v. Trueblood*, 59 Ind. 542. The decision in *Mead v. McFadden*, 68 Ind. 340, is that a widow cannot enjoin the sale of lands of the husband upon executions received by the sheriff during the life-time of the husband, and is not in point. What is there decided is that executions bound the husband's interest, whatsoever it was, and did not affect the widow's rights, and that the lien of the judgments was paramount to the widow's claim to the \$500 allowed by law. No one of these cases is in conflict with those heretofore cited; nor can either of them exert any influence upon the decision of the present case.

Reichert v. Geers.

The execution plaintiffs were proper, if not necessary, parties to this action, for they were the real parties in interest, and it was proper to bring them into court for the purpose of finally determining the controversy.

Judgment reversed with instructions to overrule the demurrers to the complaint.

REICHERT V. GEERS.

(98 Ind. 78.)

Nuisance — slaughter-house.

The operation of a slaughter-house in a populous locality is *prima facie* a nuisance, and may be restrained at the suit of neighboring residents injured thereby.*

ACTION for injunction. The opinion states the case. The injunction was granted below.

W. A. Bickle, for appellants.

H. C. Fox, for appellees.

FRANKLIN, C. Appellees brought this suit to enjoin appellants from continuing a nuisance in the use of a certain slaughter-house, in the city of Richmond, Indiana.

An issue was formed upon the complaint by a denial. There was a trial by the court, finding for plaintiffs, and over a motion for a new trial, judgment was rendered for plaintiffs. A motion to modify the judgment was also overruled.

The errors complained of and insisted upon are the overruling of the motion for a new trial and the motion to modify the judgment.

The slaughter-house complained of was situate on the bank of White Water river, in the midst of three other slaughter-houses, two above and one below, in the south-west part of the city, all of which discharged the offal and refuse matter into the bed of the river, to be carried off south away from the city by the running water in the stream.

* See *Farrell v. Cook*, ante, 721; *Pruner v. Pendleton* (75 Va. 516), 40 Am. Rep. 788.

The plaintiff Geers resided about one hundred yards from defendants' slaughter-house, and the plaintiff Merings about three hundred yards distant on the west side of the river. There were from four hundred to five hundred people residing within a radius of one-eighth of a mile of the slaughter-house; the most of them north-east thereof, and composing the south-west part of the population of the city; the river running south upon the west side of the city. South-east of the slaughter-house the lands were low, wet and unimproved.

The complaint charges that the defendants kept their slaughter-house in an unclean, impure and filthy condition, so as to allow the offal and refuse animal matter to be and remain in and about the premises until they became putrid and decayed, filling the air with noxious and offensive odors; the gathering in and keeping in pens upon the premises all kinds of stock preparatory to slaughter, and permitting the pens to become foul and filthy, until they emitted offensive odors, and the causing of unusual, loud and hideous noises by the stock while in the pens, and their groans and outcries while being killed both by day and in the night time, so as to essentially interfere with the plaintiffs, and the citizens residing in the immediate vicinity thereof, comfortably living upon and enjoying their property.

The evidence is conflicting as to the manner in which the defendants' slaughter-house had been kept for two or three years preceding the trial. There was evidence on the part of the plaintiffs clearly tending to prove the truth of the charges in the complaint, and to sustain the finding of the court. In such cases this court will not weigh the evidence and reverse the judgment on account of the overruling of a motion for a new trial, based upon the weight of the evidence.

The court rendered judgment "that the defendants and each of them, agents and employees and servants, be and they are hereby perpetually enjoined from carrying on, maintaining and operating a slaughter-house, or permitting the same to be done by others, for the purpose of killing, slaughtering and butchering hogs, cattle, sheep and other animals upon the lands owned by defendants, or either of them, as described in the complaint and situate within the corporate limits of the city of Richmond, Wayne county, Indiana, and bounded as follows, to-wit: " After giving a description of the land, then the judgment proceeds to enjoin the defendants

from carrying on and conducting the slaughter-house in the manner in which it had been conducted and carried on as charged in the complaint.

A motion to modify the judgment by striking out that part included in the above quotation was overruled by the court. The conducting of the business of a slaughter-house in a densely populated part of a city may not be considered *per se* a nuisance; still it will be considered *prima facie* a nuisance. Wood Nuis. 571. "Slaughter-houses, being generally of a noxious character, should not be established in public places, but rather in the outskirts of towns, away from habitations and public roads, and their establishment elsewhere is always perilous to the owner, for if they cannot be so conducted as not to become of a noisome character, either to individuals or the public, they will be stopped by a court of equity, or by action or indictment in a court of law. Even when they are originally built in a place remote from the habitations of men, or from public places, if they become actual nuisances by reason of roads being afterward laid out in their vicinity, or by dwellings subsequently erected within the sphere of their effects, the fact of their existence prior to the laying out of the roads, or the erection of the dwellings, is no defense." Wood Nuis., § 572; *Brady v. Weeks*, 3 Barb. 157. And the same doctrine has been held by the English courts. See authorities referred to in note to above section of Wood Law of Nuisances; *Sims v. City of Frankfort*, 79 Ind. 446; *State v. Louisville, etc., R. Co.*, 86 id. 114.

Ordinary manufactories, mills and workshops within a populous city are not necessarily *per se* or *prima facie* nuisances. Though "A lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one. Damages may be paid by the author of the nuisance and the business not be stopped, but if injunction issues then the right to conduct the business is at an end. The necessity which will authorize the granting of the writ of injunction, to restrain the carrying on of a business lawful within itself, must be a strong and imperious one. If it were otherwise, all mills and manufactories might be stopped at the demand of those to whom they caused annoyance, even though the injury complained of might be slight and trivial. * * * Courts interfere by injunction against establishments such as mills and manufactories, with great caution, and only in cases where the facts are

Norwood v. Harness.

weighty and important, and the injury complained of is of a serious and permanent character." *Owen v. Phillips*, 73 Ind. 284. See authorities therein cited.

But slaughter-houses are of a somewhat different nature. They necessarily, to some extent, cause the atmosphere in their vicinity to become impure, noxious, poisonous and unhealthy. Hence, when located in a populous part of a city, they are held to be *prima facie* nuisances. *Pruner v. Pendleton*, 75 Va. 516; s. c., 40 Am. Rep. 738. In this case, according to the decision of the court below, the evidence failed to overcome this *prima facie* case, and we think the evidence fairly tended to support the finding and judgment of the court. There was no error in overruling the motion to modify the judgment. It ought to be affirmed.

PER CURIAM. It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

NORWOOD V. HARNESS.

(98 Ind. 124.)

Executor and administrator — liability for loss of money by failure of depositor.

An administrator is not liable for the loss of estate funds deposited by him in a bank generally reputed and supposed by him to be solvent, by the subsequent failure of the bank.

A PPEAL from decree of final settlement. The opinion states the case.

R. Hill and J. W. Nichol, for appellant.

L. Ritter, E. F. Ritter & B. W. Ritter, for appellees.

BICKNELL, C. C. This is an appeal by an administrator from a judgment of said court requiring him to make a final settlement report in ten days, and to pay into court for distribution the moneys with which he was chargeable.

A citation had been issued on petition of the appellees, requiring the administrator to make a final settlement or show cause why he should not.

Norwood v. Harness.

In his answer to that citation he stated his appointment as administrator on the 3d day of August, 1882; that his decedent when he died had \$4,188.80 on deposit in the Indiana Banking Company, where he had kept his money since 1865; that said administrator was informed by Ingram Fletcher, a banker of Indianapolis, that said Indiana Banking Company was safe and solvent, and he also learned that many leading business men of Indianapolis were making deposits in said banking company; that in view of these facts and believing said company to be solvent and safe, he had said sum of \$4,188.80 transferred to his credit as such administrator, and afterward kept it and moneys of his decedent's estate on deposit with said company; that he never knew and never heard that said company was insolvent or embarrassed, until it failed on the 10th of August, 1883; that he is a farmer living about six miles from Indianapolis, and had no safe way of keeping the money at home, and so far as he could learn said company was as safe as any other bank in Indianapolis; that he had on deposit with said company when it failed \$4,103.31, of which he had not been able to collect a dollar; that he has a judgment against said company for the full amount of said deposit and has made proof in order to obtain a dividend from the receiver of said company but has not yet received any thing; that at the time of said failure he was prosecuting a suit in the Superior Court of Marion county, on a note executed by William Smock and Isaac Smock to said decedent, which was contested, and was also attempting to collect a note made by W. S. Thomas and John Thomas and payable to him as administrator, and was trying to be ready for final settlement at the September term of said court, 1883; that no final settlement could be made before said September term, 1883, because at the May term, 1883, of said court, a year had not elapsed since the date of his appointment as administrator; that on the 17th of September, 1883, he filed in this court a partial report as such administrator, showing a balance in his hands of \$4,103.31, and that all of said balance was on deposit in said Indiana Banking Company when it failed; that said claim against William Smock and Isaac Smock was compromised about January 1, 1884, and that all the debts of said estate have been paid, and that said claim against William S. Thomas and John Thomas could be adjusted, and final settlement now made, but for the fact that no part of said deposit in the Indiana Banking Company can now be collected, wherefore

Norwood v. Harness.

he cannot make a final report; that he is not personally liable to make good to said estate said loss by the failure of said company, but is bound to account for so much only of said money as can be collected from said banking company and its individual members. The answer concludes with a prayer that the final settlement of said estate be postponed, and that he be held accountable for so much only of said deposit as he may be able to collect.

To this answer the petitioners replied in two paragraphs:

1. A general denial.

2. That they are heirs at law of the decedent and entitled to distribution; that there were no debts against said estate and no claims in favor thereof; that long before the failure of said banking company, to-wit, on May 11, 1883, the Marion Circuit Court had settled the question as to the interests of the several heirs in the balance to be distributed, of which said administrator had notice; that said administrator kept the funds of the estate in the Indiana Banking Company, upon an agreement to receive interest therefor, although he kept his own private account with another bank; that before the failure of the Indiana Banking Company, more than a year had elapsed after the appointment of said administrator, who ought to have paid over and distributed all of said money before said failure, and by his negligence in failing so to do said money was lost; that said money was deposited by said administrator of his own motion, without order of court or consent of parties, although at the time of said deposit, said company was and long had been insolvent and without capital, and that the facts as to its condition might and ought to have been known to said administrator, if he had made any effort to obtain them; that said loss was caused by said unlawful acts and omissions of said administrator. The reply concluded with a prayer that the administrator be ordered to pay over said money to the clerk of the court, and to file his report in final settlement.

A demurrer to the second paragraph of this reply, for want of facts sufficient, was overruled. A motion for a change of venue was made by the administrator and was overruled. The cause was submitted to the court for trial, and at the request of the administrator the court made a special finding of the facts and stated conclusions of law thereon. The following was the substance of the special finding: [Omitted.] Upon these facts the conclusions of law were as follows: That said administrator is not entitled to any

Norwood v. Harness.

credit for losses sustained by such deposit in the Indiana Banking Company, and that he has shown no reason why he should not immediately settle said estate that said Superior Court of Marion county has no jurisdiction to enforce any claim against said estate in said suit upon said official bond; that said estate and funds, and the administration thereof, are under the control of this court, and can be reached only by a claim duly filed in this court, and that the order of the judge of said Superior Court, and the proceedings had in consequence thereof, present no excuse why said administrator should not settle the same immediately.

To these conclusions of law the administrator excepted.

A motion for a new trial made by the administrator was overruled, and a judgment was rendered requiring the administrator to pay the costs, and to file in said court, within ten days, his final settlement report, and to pay into court, for distribution, the moneys with which he stands charged. The administrator assigns errors on his appeal as follows: [Omitted.] The principal question in the case arises on the third specification of error, which is that the conclusions of law upon the facts found were erroneous, and upon the first three reasons for a new trial, which are substantially that the findings were not sustained by the evidence.

The first conclusion of law presents the question, when is a trustee liable for losses sustained by the failure of a bank having on deposit his trust money? On this subject the general rules which govern trustees are applicable to administrators. 2 Williams Ex'rs, 1717, 1781.

“With respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, the rule, at least in equity, seems to be that when the deposit was made from necessity, or conformably to the common usage of mankind, the executor will not be responsible for the loss.” 2 Williams Ex'rs, 1545.

In *Churchill v. Hobson*, 1 P. Wms. 241, the Lord Chancellor HARCOURT said: “Neither do I think the executor Churchill ought to be chargeable for the £500 by him paid to Goodwyn, he having been the cashier with whom the testator in his life-time chose to intrust his money, and therefore the executor ought not to suffer for having trusted him whom the testator himself in his life trusted.”

In *Knight v. Plymouth*, 3 Atk. 480, where a receiver in the

Norwood v. Harness.

country had collected rents, and instead of sending the money to London in specie, had remitted it in bills of exchange upon London, procured from one Winsmore which were afterward dishonored, Lord Chancellor HARDWICKE said: "It would be very hard to oblige the receiver to make good a loss which was not owing to any default of his, but as the sum was large, it was a necessary precaution to remit it by bills, rather than in specie, and at the time the money was paid to Winsmore, he had no reason to doubt its being lodged in a safe hand."

In the case of *Belchier v. Parsons*, Ambler, 219, Lord HARDWICKE said: "If trustee appoints rents to be paid to a banker * * * and the banker afterward breaks, the trustee is not answerable."

In *Rowth v. Howell*, 3 Vesey, 565, the funds of a testator were in his banker's hands when he died; they were left there by his executor, and were subsequently lost by the failure of the banker. The chancellor, Lord LOUGHBOROUGH, held that the executor ought not to be charged, and he said: "If he had taken them" (the securities) "to his chambers, he would have been liable to any casualty that might have happened."

In *Adams v. Claxton*, 6 Vesey, 226, negotiations were pending for the appointment of another trustee, and certain moneys were temporarily deposited with one Nightingale, a banker, who stopped payment. The deed of trust contained no direction for depositing the money with a banker, yet the master of the rolls said: "The defendant Claxton is not to be charged with the money deposited in Nightingale's bank."

In *Williams Ex'rs*, 2049-50, it is said that even if an executor has admitted assets before suit, if a strong case be made out, he may be relieved from the admission, as if the money were in a banker's hands who failed.

In 2 Story Eq. Jur., § 1269, it is said of a trustee: "So, if he should deposit the money with the banker in good credit, to remit it to the proper place by a bill, drawn by a person in due credit, and the banker or drawer of the bill should become bankrupt, he would not be responsible. The rule in all cases of this sort is, that when a trustee acts by other hands, either from necessity, or conformably to the common usage of mankind, he is not to be made answerable for losses."

In *Swinfen v. Swinfen*, 29 Beav. 211, an executrix had the money of her testator's estate in a private bank which became bankrupt

and the money was lost. The master of the rolls allowed the executrix a credit for the amount lost.

In *Johnson v. Newton*, 11 Hare, 160, a testator had £3,000 in the hands of his bankers, and his executors continued the deposit; about nine months afterward the bankers became bankrupt, and the estate lost thereby £1,000. A master had reported that "there were not any purposes of their trust which rendered it necessary for the executors to retain the balance, or any part of it, with the bankers." Yet the court held that the executors were not answerable for the loss, and said: "I think if the court should hold parties in that situation to be liable for losses occurring under circumstances like the present, it would become impossible to find proper persons to accept the duty."

In *Hill on Trustees*, 573, it is said: "So where the trust funds are properly deposited with a banker or agent, who fails, the trustee will be allowed the sum so lost."

In *Cornwell v. Deck*, 8 Hun, 122, an administratrix having kept the money of the estate in her house, instead of depositing it in a bank, the nearest bank being twelve miles distant, the money was stolen, she was held liable, and the Supreme Court of New York said: "It is repeatedly held that if a trustee in the exercise of his best judgment deposits money in a bank of good repute, he is not liable in the event of the failure of the bank. * * * Her husband had kept a bank account, of which she was aware. Although the bank was some twelve miles off, he had deemed it proper to deposit in it there, and she could and should have done the same."

In *Wharton on Negligence*, § 519, we find the following: "A * * * trustee * * * or executor has currency in hand belonging to his trust. Is he to keep this in his own house? This would be negligent, and would make him liable in case of loss, except under extreme circumstances of *vis major*. His duty is to deposit such funds in bank; and this duty is satisfied, apart from statutory limitations, if the bank at the time of deposit is in good reputation, and if there is nothing in way of public rumor subsequently occurring which would lead a good business man to withdraw his fund."

"Trust moneys may be deposited for a reasonable time in a bank having good credit, if the deposit is made to the credit of the trust estate, and not in the trustee's individual name and account; and the trustee does not become liable for a loss occasioned by a failure

of the bank under these circumstances." 2 Pomeroy Eq. Jur., § 1067. And see *McCabe v. Fowler*, 84 N. Y. 314.

The result of the foregoing authorities is that a trustee is not liable merely because instead of undertaking to keep the trust money safely in his own house he deposits it in a private bank which fails, nor because the bank is weak, unless that fact was known to the trustee, or might have been known by the exercise of ordinary prudence and diligence. The question in all such cases is, was the trustee reasonably prudent and diligent in making or continuing the deposit? If so he will not be liable although the bank was and had been insolvent. Such insolvency will not affect him unless he knew it, or unless it was generally known, or unless there were general rumors, injuriously affecting the credit of the bank, which were known to the trustee or might have been so known by reasonable diligence. There is a class of cases in which trustees have been held liable for losses on investments made contrary to the directions of the instrument creating the trust, or without any authority to invest, or upon personal security merely. *Rehden v. Wesley*, 29 Beav. 213; *Barney v. Saunders*, 16 How. 535; *Darke v. Martyn*, 1 Beav. 525; *Perry Trusts*, § 465.

But even in relation to such investments, the author last cited, in the section just referred to says: "In States where there are no fixed funds or securities in which trustees shall invest, the fact that a testator has invested his property in particular stocks, shares of corporations, mortgages or other securities, thus indicating his confidence in such investments, will go far to justify the trustees in continuing them."

There is a clear distinction between an investment and a deposit. In the former the trustee loses the control of the money; in the latter he retains it. His business is to keep the money safely and banks are commonly used as safe places of deposit by prudent men. There is nothing in the decisions upon investments which impairs the force of the cases above cited as to deposits, or changes the rule to be deduced therefrom as hereinbefore set forth.

[Omitting considerations of fact.]

We think that the finding that "for five years this bank had the reputation of being an unsafe and weak bank in Indianapolis and the surrounding neighborhood, which reputation said Norwood could have learned by ordinary or reasonable diligence," is contrary to the evidence, and that therefore the court erred in overruling

Elkhart County Lodge v. Crary.

the motion for a new trial. This result renders it unnecessary to consider any of the other reasons alleged for a new trial, or any other of the errors assigned.

PER CURIAM. It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellees, and this cause is remanded for a new trial.

Reversed and remanded.

ELKHART COUNTY LODGE V. CRARY.

(98 Ind. 283.)

Contract — against public policy.

The owners of land in a city agreed with the owners of an adjacent building that if the latter would offer that building to the government for a nominal rent for a post-office for ten years, and use all "proper persuasion" to secure its acceptance, they would pay them a certain sum annually for that period, in case of the government's acceptance. The building was accepted by the government, one of the owners, a personal friend of the postmaster-general, truthfully representing to him that the situation was suitable, and notes were given by the defendants for the annual installments as agreed. *Held*, that the agreement was against public policy and the notes were void.

ACTION on notes. The opinion states the case. The defendant had judgment below.

A. D. Wilson, Davis, J. H. Baker and J. A. S. Mitchell, for appellants.

W. S. Stone, for appellee.

ELLIOTT, C. J. The material facts of this case are these: In October, 1878, the post-office in Goshen was kept in a room not affording suitable accommodations for the public, and there was a necessity for its removal. The postmaster was required by the government to furnish a room for the office and the rent was payable out of his salary. The value of adjacent property was en-

Elkhart County Lodge v. Crary.

hanced by the location of the post-office and its rental value increased. The citizens of Goshen requested that the location of the office should be changed, and thereupon a competition arose between property owners of two localities, and property owners on Main street made a proposition to the department that they would furnish a suitable building for the office, and this proposition was made known to the appellants who were property owners on Market street, and were desirous of having the post-office located on that street. The appellants were the owners of a brick building on Market street, in course of erection, which was suitably located for the post-office; the appellee was the owner of real estate in the vicinity of appellants' building and was desirous of having the post-office located near his property. The appellants proposed to the appellee and other property owners, that they would fit up a room in their building with all suitable conveniences and equipments for a post-office, and tender it to the government, rent free or for a nominal rent for ten years, on condition that the post-office should be maintained in the room for that period. A verbal preliminary agreement was made, wherein the property owners agreed that they would each pay to the appellants a certain sum yearly for ten years, provided the appellants would propose to the government to yield their room for a post-office at a nominal rent for ten years, and that "they would use all proper persuasion to secure the location of the post-office in their room." The notes in suit were executed pursuant to this agreement, and for the consideration therein specified. One of the appellants was a personal friend of the postmaster-general, and represented to that officer that the location was a suitable one, and urged upon him the propriety of placing the office in appellants' building. The representation that the location was a suitable one was true. The proposition made by the appellants was accepted by the government, and the nominal rent of \$12 per annum was agreed upon, and the room leased for a period of ten years for a post-office.

The material deduction of fact from these subsidiary facts is that the parties formed a combination for the purpose of securing the location of a public office, and as part of the plan the appellants undertook that certain individuals of their number should use their influence with the government officers to effect the purpose of the combination, and that the agreement to pay for such services was contingent upon the success of the scheme.

Elkhart County Lodge v. Crary.

It has long been established that a contract against public policy will not be enforced. This principle is firmly fixed and has often been applied to contracts. There can therefore be no doubt as to the existence of the rule; the only question is as to its applicability to the facts of this case.

Where the general public has an interest in the location of an office, a railroad station, or the like, a contract to secure its location at a particular place is held to be against public policy and not enforceable. There are very many cases holding that an agreement to locate a railroad station at a designated place is not enforceable because against public policy. *St. Louis, etc., R. Co. v. Mathers*, 104 Ill. 257; *Williamson v. Chicago, etc., R. Co.*, 53 Iowa, 126; s. c., 36 Am. Rep. 206; *vide* authorities n. 214. The principle upon which these cases proceed is that the public good, and not private interest, should control in the location of railroad depots, and this principle certainly applies with full force to an office of a purely public character, such as a post-office. We find in these railroad cases, and there are very many of them, a principle which supplies a rule governing such a case as the present. It is true that there is some difference in the views of the courts upon the question whether an agreement for the location of a depot is valid when it does not restrict the location to the place named, and no other, but upon the general principle there is entire harmony. In the present case the difference in the opinions of the courts is an unimportant consideration, for here the location is restricted to one place and no other, for a period of ten years, and the case therefore falls within the holding of the cases most favorable to the appellants. We say that the location is restricted to one place for the reason that it is matter of judicial knowledge that but one post-office can be located in the city of Goshen. While the cases of which we have spoken establish a principle which rules this case, there are others, which in their general features more nearly resemble the one at bar. Closely analogous in principle are those cases which hold that contracts which may tend to the injury of the public service are void. *Card v. Hope*, 2 B. & C. 661; *Wells v. Foster*, 8 M. & W. 149; *Blachford v. Preston*, 8 T. R. 89; *Tool Co. v. Norris*, 2 Wall. 45; *Ashburner v. Parrish*, 81 Penn. St. 52.

There are many phases of injury to the public service, and we do not deem it necessary to examine the cases upon the subject, for we think it quite clear that a contract which is made for the pur-

Elkhart County Lodge v. Crary.

pose of securing the location of an important office connected with the public service for individual benefit, rather than for the public good, tends to the injury of the public service. The case made by the evidence falls fully within the principle that contracts which tend to improperly influence those engaged in the public service, or which tend to subordinate the public welfare to individual gain, are not enforceable in any court of justice. Pollock Cont. 279; Anson Cont. 175; 1 Whart. Cont., §§ 402 to 414 inclusive. A wholesome rule of law is that parties should not be permitted to make contracts which are likely to set private interests in opposition to public duty or to the public welfare. This rule is recognized in our own case of *Maguire v. Smock*, 42 Ind. 1; s. c., 13 Am. Rep. 353, where it was held that an agreement to pay a consideration to a property owner for signing a petition to secure the improvement of a street was void, although there was no fraud, and although the person to whom the promise was made was really in favor of the improvement.

It is not necessary that actual fraud should be shown, for a contract which tends to the injury of the public service is void, although the parties entered into it honestly and proceeded under it in good faith. The courts do not inquire into the motives of the parties in the particular case to ascertain whether they were corrupt or not, but stop when it is ascertained that the contract is one which is opposed to public policy. Nor is it necessary to show that any evil was in fact done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit. An English author says: "But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void." Pollock Prin. Cont. 286. In the case of *Tool Co. v. Norris*, *supra*, the court said: "All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in any of the courts of the country."

Elkhart County Lodge v. Crary.

The case in hand is plainly distinguishable from those in which a promise is made to the public through its representatives. Here the motive of the contracting parties was to secure the location of a public office to advance their private interests, and not to benefit the public and here too there was competition between two localities. The case therefore is one in which there should have been no influence brought to bear upon the decision of the contest except that of the public good.

The cases of *Peirce v. Ruley*, 5 Ind. 69; *Commissioners v. Perry*, 5 Ohio, 56; *State Treasurer v. Cross*, 9 Vt. 289; 31 Am. Dec. 626, hold that a contract with the officers of the State for the benefit of the State is valid, but they clearly distinguish between the cases where a promise is made to an individual for his private benefit and those in which the promise is made to a public officer for the benefit of the public. This distinction is made in the case of *State v. Johnson*, 52 Ind. 197, and in the course of the opinion the following extract from the decision in *Clippinger v. Hepbaugh*, 5 Watts & S. 312; 40 Am. Dec. 519, is approvingly quoted: "It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence over an important branch of the government." The difference between the two classes of cases is clearly stated in *Odineal v. Barry*, 24 Miss. 9, where it was said: "The members of the board of police, as individuals, will not receive any portion of the money for which the note was given. At the time of the contract it was not intended or expected that they should receive it. It was not a proposition by the defendants to pay them so much as individuals, in consideration that they would not change the site of the court-house. If it had been, it would have been clearly illegal, and could not have been enforced."

It is true that a contract to pay for professional services in fairly placing the facts of a case before the officers of government is valid. *Trist v. Child*, 21 Wall. 441; Smith Lead. Cases (7th Am. ed.), 692; *Bryan v. Reynolds*, 5 Wis. 200. But the contract in this case is not for professional services but for personal influence, and this constitutes an essential element, for personal influence is not a commodity for which money can be demanded. The case of *Oscanyan*

Elkhart County Lodge v. Crary.

v. *Arms Co.*, 103 U. S. 261, cited by appellants, is directly against them upon this point. In the course of the opinion in that case it was said: "But independently of the official relation of the plaintiff to his government, the personal influence which he stipulated to exert upon another officer of that government was not the subject of bargain and sale. Personal influence to be exercised over an officer of government in the procurement of contracts * * * is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article. Numerous adjudications to this effect are found in the State and Federal courts. This is true when the vendor holds no official relations with the government, though the turpitude of the transaction becomes more glaring when he is also its officer." In *Trist v. Child*, *supra*, the court in speaking of professional services, said: "But such services are separated by a broad line of demarcation from personal solicitation."

While contracts for the payment of fixed fees for professional services are valid, yet when the fees are made contingent upon success in obtaining the desired legislation, the contract sought, or the office asked of the government, the contract becomes so tainted with illegality as to render it void. "High contingent compensation," said Justice GRIER, "must necessarily lead to the use of improper means and the exercise of undue influence," and the decisions give approval to his discussion of the question of the legality of such contracts, and concur in the conclusion that all such contracts are against sound public policy. *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314; *Meguire v. Corwine*, 101 U. S. 108; *Oscanyan v. Arms Co.*, *supra*, see opinion, p. 274; *Clippinger v. Hepbaugh*, *supra*; *Wood v. McCann*, 6 Dana (Ky.), 366; *Mills v. Mills*, 40 N. Y. 543; *Ormerod v. Dearman*, 100 Penn. St. 561; s. c., 45 Am. Rep. 391.

The contract before us has two infirmities, one of an agreement for the use of personal influence, and another of an agreement for compensation dependent upon the contingency of success. That we are correct in saying that the agreement is dependent upon a contingency is shown by the fact that the consideration became payable only in the event that the post-office was located and maintained in appellant's building.

Doubtless a contract to assist a property owner in fitting up or purchasing a building to be given to the government for public use would be valid, but in the present instance this was not

Terre Haute and Indianapolis Railroad Company v. McMurray.

the character of the consideration of the notes in suit, although such an element may have formed part of the consideration. The consideration of the notes is indivisible and the illegal cannot be separated from the legal, and under the familiar rule that where the consideration is in part illegal and there can be no separation, the whole contract is void. The contract before us must be held invalid because of the illegality of the consideration.

Judgment affirmed.

**TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY V.
MCMURRAY.**

(98 Ind. 338.)

Master and servant—authority of conductor to employ surgeon for injured brakeman.

Where a railway brakeman is injured in the discharge of his duty at a point distant from the chief offices of the company, and stands in need of immediate surgical attendance, the conductor may bind the company by the employment of a surgeon, if there is no superior agent of the company present.

ACTION for services. The opinion states the case. The plaintiff had judgment below.

J. G. Williams, for appellant.

J. Claybaugh and *B. K. Higinbotham*, for appellee.

ELLIOTT, J. The facts in this case are simple, and lie within a narrow compass, but the questions of law are important and difficult.

Frankfort is a way station on the line of appellant's road, distant many miles from the principal offices of the company and from the residences of its chief officers. At this station, at one o'clock in the morning of July 2, 1881, Thomas Coon, a brakeman in the service of the appellant, had his foot crushed between the wheel of a car of the train on which he was employed as brakeman, and a rail of the track. The injury was such as demanded immediate surgi-

Terre Haute and Indianapolis Railroad Company v. McMurray.

cal attention. The conductor of the train requested the appellee, who was a surgeon residing in the town of Frankfort, to render the injured man professional aid and informed the appellee that the company would pay him for such services. At the time the accident happened, and at the time the surgeon was employed, there was no officer superior to the conductor at the town of Frankfort. There was at the station a resident agent who had full knowledge of the injury to Coon, and of appellee's employment. This agent was in telegraphic communication with the principal officers of the company, but did not communicate with them. The trial court held the appellant liable for the reasonable value of the services rendered by the appellee, and awarded him \$100.

In ordinary cases, a conductor or other subordinate agent has no authority to employ surgical assistance for a servant of the corporation who receives an injury or becomes ill. We do not doubt that the general rule is that a conductor has no authority to make contracts with surgeons, and if this principle governs all cases the discussion is at an end; but we do not think it does rule every case, for there may be cases so strongly marked as to constitute a class in themselves and one governed by a different rule.

The authority of an agent is to be determined from the facts of the particular case. Facts may exist which will greatly broaden or greatly lessen an agent's authority. A conductor's authority in the presence of a superior agent may dwindle into insignificance; while in the absence of a superior it may become broad and comprehensive. An emergency may arise which will require the corporation to act instantly, and if the conductor is the only agent present, and the emergency is urgent, he must act for the corporation, and if he acts at all his acts are of just as much force as that of the highest officer of the corporation. In this instance the conductor was the highest officer on the ground; he was the sole representative of the corporation; he it was upon whom devolved the duty of representing the corporation in matters connected within the general line of his duty in the sudden emergency which arose out of the injury to the fellow-servant immediately under his control; either he as the superior agent of the company, must in such cases be its representative, or it has none. There are cases where the conductor is the only representative of the corporation that in the emergency it can possibly have. There are cases where the train is distant from the supervision of superior officers where the con-

Terre Haute and Indianapolis Railroad Company v. McMurray.

ductor must act, and act for the company, and where for the time and under the exigencies of the occasion, he is its sole representative, and if he be its only representative he must for the time and exigency be its highest representative. Simple examples will prove this to be true. Suppose for illustration, that a train is brought to a halt by the breaking of a bolt, and that near by is a mechanic who can repair the broken bolt and enable the train to proceed on its way, may not the conductor employ the mechanic? Again, suppose a bridge is discovered to be unsafe, and that there are timbers at a neighboring mill which will make it safe, may not the conductor in behalf of his principal, employ men to haul the timber to the bridge? Once more, suppose the engineer of a locomotive to be disabled and that it is necessary to at once move the train to avoid danger, and there is near by a competent engineer, may not the conductor employ him to take the train out of danger? In these examples we mean to include as a silent factor, the fact that there is an emergency allowing no time for communicating with superior officers, and requiring immediate action. If it be true that there are cases of pressing emergency where the conductor is on the special occasion the highest representative of the company, then it must be true that he may do in the emergency what the chief officer if present might do. If the conductor is the only agent who can represent the company, then it is inconceivable that he should for the purposes of the emergency, and during its existence, be other than the highest officer. The position arises with the emergency and ends with it. The authority incident to the position is such and such only as the emergency imperatively creates.

Assuming, as we may justly do, that there are occasions when the exigency is so great, and the necessity so pressing, that the conductor stands temporarily as the representative of the company, with authority adequate to the urgent and immediate demands of the occasion, we inquire what is such an emergency as will clothe him with this authority and put him in the position designated. Suppose that a locomotive is overturned upon its engineer, and he is in immediate danger of great bodily harm, would it not be competent for the conductor to hire a derrick, or a lifting apparatus, if one were near at hand, to lift the locomotive from the body of the engineer? Surely some one owes a duty to a man, imperilled as an engineer would be in the case supposed, to release

Terre Haute and Indianapolis Railroad Company v. McMurray.

him from peril, and is there any one upon whom this duty can be so justly put as upon his employer? The man must, in the case supposed, have assistance, and do not the plainest principles of justice require that the primary duty of yielding assistance should devolve upon the employer rather than on strangers? An employer does not stand to his servants as a stranger, he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty, and no one will deny that such a duty does exist, the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon the breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once, and suppose the accident to occur at a point where there is no station and when no officer superior to the conductor is present, would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that some one must discharge? And if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that some one owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty, and surely where the question comes between the employer and a stranger, the just rule must be that it rests upon the former.

Authorities upon the question we are discussing are far from abundant. In the case of *Marquette, etc., R. Co. v. Taft*, 28 Mich. 289, a laborer in the service of the company was struck and injured by one of its trains, and the yardmaster and the superintendent employed a surgeon, and the court divided on the question of the company's liability, GRAVES and CAMPBELL, JJ., denying its liability and COOLEY, J., and CHRISTIANCY, U. J., affirming that it was liable to the surgeon. One opinion was written by GRAVES, J., and proceeds on the broad ground that no officer of the company could bind it to pay for surgical services rendered an employee. That case is however distinguishable from the present, even upon the theory adopted in the opinion of Judge GRAVES, for in this case there was an immediate necessity for surgical aid, while in the one cited there is not shown to have been any such necessity.

Terre Haute and Indianapolis Railroad Company v. McMurray.

Judge COOLEY's opinion is a model of judicial reasoning, and forcibly maintains the duty of railway companies to provide surgical aid for its servants in cases of accidents incident to their employment. In one place he says: "We think it their duty to have some officer or agent, at all times, competent to exercise a discretionary authority in such cases, and that on grounds of public policy they should not be suffered to do otherwise." At another place he says: "We shall not stop to prove that there is a strong moral obligation resting upon any one engaged in a dangerous business, to do what may be immediately necessary to save life or prevent an injury becoming irreparable when an accident happens to a person in his employ. We shall assume this to be too obvious to require argument." Another extract from this opinion, strongly applicable, is this: "There can be no doubt that it is within the scope of somebody's employment for a railway company to cause a beast which is injured in carriage or run over at a crossing to be picked up and have the attention proper and suitable to its case; and if no one is authorized to do as much for the faithful servant of the company who is in like manner injured, but all persons in its service are impliedly forbidden to incur on its behalf any expense beyond what may be necessary to remove him out of the way of their trains and machinery, even to convey him to his house, or to save his life by binding up a threatening wound, then if such is the law, the courts must not hesitate to apply it, even though it be impossible to avoid feeling that it ought not to be the law, and that no business of this extensive and hazardous nature ought to be suffered to be carried on with no one for the major part of the time empowered to recognize and perform a duty, which at least on moral grounds, is so obvious and imperative. But we do not think such is the law."

In the case of *Northern Central Ry. Co. v. State*, 29 Md. 420, it was held that it is the duty of agents in charge of a railroad train to take care of one injured by a collision, and to do it with a proper regard to his safety and the laws of humanity.

It was held in *Walker v. Great Western Ry. Co.*, L. R., 2 Exch. 228, that the general manager of the company had authority to employ a surgeon for a servant injured in the company's service. Chief Baron KELLY, in the course of the argument, inquired: "Must a board be conveyed before a man who has both his legs broken can have medical assistance?"

Terre Haute and Indianapolis Railroad Company v. McMurray.

In *Swazey v. Union Manufacturing Co.*, 42 Conn. 556, the court held that the business manager of a manufacturing corporation had authority to employ surgical aid for a lad who had received an injury in its service.

In *Atlantic, etc., R. Co. v. Reisner*, 18 Kans. 458, the holding was that the general agent of a railroad company was authorized to employ a surgeon to attend one of the brakemen injured while in the service of the company. The court said in the course of the opinion: "In other words, the general agent of the company is virtually the corporation itself." This is necessarily true in cases where the agent is required to act for the corporation, and is also true where the agent who acts is the highest agent of the corporation present, although he may not be the general agent of the corporation. A corporation can act, and can be present, only by its agent, and when it must act and must be present at a particular time and place, then it is present, and does act, through the highest agent who is on the ground. If the agent represents the corporation by authority, then, so far as he represents it in the particular matter, he is, in law, the corporation, for through him it is present and acting. If then the conductor is the highest agent on the ground, and the corporation must and does act, his act is just as much that of the corporation in the particular instance, and circumscribed by the exigencies of the special occasion, as though he were much higher in authority. The ruling in *Atchison, etc., R. Co. v. Reeher*, 24 Kans. 228, is that the general superintendent of a railroad company has authority to employ a surgeon to attend a man injured while in its service. The cases of *Toledo, etc., Ry. Co. v. Rodrigues*, 47 Ill. 188; *Toledo, etc., Ry. Co. v. Prince*, 50 id. 26; *Indianapolis, etc., R. Co. v. Morris*, 67 id. 295; *Cairo, etc., R. Co. v. Mahoney*, 82 id. 73, cited and relied on by the appellant, all recognize the doctrine that the superintendent or general agent has authority to employ a surgeon to treat a servant who has been injured. If we are right in our conclusion that an emergency may arise which will constitute a conductor, for the time and the emergency, the chief officer of the corporation present, then those cases are strongly in support of our position that he may, in cases of urgent necessity, bind the corporation by contracting with a surgeon. For once it is conceded that the officer having a right to represent the company is the company, it inevitably follows that his contract is that of the corporation. These cases do deny, however, in general

Terre Haute and Indianapolis Railroad Company v. McMurray.

terms, the authority of a station agent or conductor to employ a surgeon, but they affirm that if the superintendent has notice of the services rendered by the surgeon, and does not disavow the agent's acts, the company will be bound. It is to be noted that in all of these cases the company was held liable on the ground of ratification by the superintendent, and there was really no decision of any other question than that a failure of the superintendent to disavow the contract of the conductor or station agent rendered the company liable. There was no discussion of the authority of a conductor in cases of immediate and urgent necessity. The reasoning of the court in these cases strongly indicates that the act of the superior officer, whoever he may be, on the occasion and under the emergency, would be deemed the act of the corporation which he assumes to represent. In the last of these cases it is said: "While a railroad company is under no legal obligation to furnish an employee, who may receive injuries while in the service of the company, with medical attendance, yet where a day laborer has, by an unforeseen accident, been rendered helpless when laboring to advance the prosperity and the success of the company, honesty and fair dealing would seem to demand that it should furnish medical assistance." If it be conceded that honesty and fair dealing require that medical assistance should be furnished, then the law requires it, for the law always demands honesty and fair dealing. It would be a cruel reproach to the law, and one not merited, to declare that it denied to an injured man what honesty and fair dealing require.

If it should appear that a man had been denied what honesty and fair dealing required of his master, and death should result, it would seem clear, on every principle of justice, that the master would be responsible for the servant's death. Of course, this duty could not rest upon the master in ordinary cases, but should rest upon him in extraordinary cases, where immediate medical assistance is imperatively demanded. The case of *Tucker v. St. Louis, etc., Ry. Co.*, 54 Mo. 177, does decide that a station agent has no authority to employ a surgeon, but no element of pressing necessity entered into the case. There is no authority cited in support of the opinion, nor is there any reasoning. All that is said is: "It is only shown that they" (the station agent and the conductor) "were agents of defendant in conducting its railroad business, which of itself could certainly give them no authority to employ physicians, for the defendant, to attend to and treat persons acci-

Terre Haute and Indianapolis Railroad Company v. McMurray.

dentally injured on the roads." It may be that this statement is true in ordinary cases, but when we add the element of immediate and pressing necessity, a new and potent factor is introduced into the case. A brief opinion was rendered in *Brown v. Missouri, etc., Ry. Co.*, 67 Mo. 122, declaring that the superintendent of the company could not bind the company for "a small bill of drugs furnished a woman who had been hurt by the locomotive or cars of the defendant." It may be said of the last cited case that it presented no feature of emergency requiring prompt action, and for aught that appears in the meagre opinion of a very few lines, there may have been no necessity for action. But it is further to be said of it, that if it is to be deemed as going to the extent of denying the right of one of the principal officers to contract for medicine in a case of urgency, it finds no support from any adjudged case. The case of *Mayberry v. Chicago, etc., R. Co.*, 75 Mo. 492, is not in point, for there a physician employed to render medical aid, and employed for no other purpose, undertook to contract for boarding for an injured man.

The learned counsel for appellant says, in his argument: "In several of these cases the court takes occasion to say that humanity, if not strict justice, requires a railroad company to care for an employee who is injured without fault on his part in endeavoring to promote the interests of the company. Whilst this may be true, I think humanity and strict justice, too, would at least permit the company to adopt the proper means for exercising the required care and of determining the cases wherein it ought to be exercised."

It seems to us that while the concession of the counsel is required by principle and authority, his answer is far from satisfactory. Can a man be permitted to die while waiting for the company to determine when and how it shall do what humanity and strict justice require? Must there not be some representative of the company present in cases of dire necessity to act for it? The position of counsel will meet ordinary cases, but it falls far short of meeting cases where there is no time for deliberation, and where humanity and justice demand instant action. From whatever point of view we look at the subject we shall find that the highest principles of justice demand that a subordinate agent may, in the company's behalf, call surgical aid, when the emergencies of the occasion demand it, and when he is the sole agent of the company in whose power it is to summon assistance to the injured and suffering servant.

Terre Haute and Indianapolis Railroad Company v. McMurray.

Humanity and justice are for the most part inseparable, for all law is for the ultimate benefit of man. The highest purpose the law can accomplish is the good of society and its members, and it is seldom, indeed, that the law refuses what humanity suggests. Before this broad principle bare pecuniary considerations become as things of little weight. There may be cases in which a denial of the right of the conductor to summon medical assistance to one of his train-men would result in suffering and death; while on the other hand, the assertion of the right can, at most, never do more than entail upon the corporation pecuniary loss. It may not do even that, for prompt medical assistance may, in many cases, lessen the loss to the company by preventing loss of life or limb.

The authority of a conductor of a train in its general scope is known to all intelligent men, and the court that professes itself ignorant of this matter of general notoriety avows a lack of knowledge that no citizen who has the slightest acquaintance with railroad affairs would be willing to confess. It is true that the exact limits of his authority cannot be inferred from evidence that he is the conductor in charge of the train, but the general duty and authority may be. This general authority gives him control of the train-men and of the train, and devolves upon him the duty of using reasonable care and diligence for the safety of his subordinates. The authority of the conductor may be inferred, as held in *Columbus, etc., Ry. Co. v. Powell*, 40 Ind. 37, from his acting as such in the control of the train, but this inference only embraces the ordinary duties of such an agent. Many cases declare that the conductor, in the management of the train and matters connected with it, represents the company. It is true that the agency is a subordinate one, confined to the subject-matter of the safety of the train and its crew, and the due management of matters connected with it, but although the conductor is a subordinate agent he yet has broad authority over the special subject committed to his charge. It was said in *Jeffersonville Ass'n v. Fisher*, 7 Ind. 699, that "It is not the name given to the agent, but the acts which he is authorized to do, which must determine whether they are valid or not, when done." In another case it was said: "The authority of an agent being limited to a particular business does not make it special; it may be as general in regard to that, as though its range were unlimited." *Cruzan v. Smith*, 41 Ind. 288. This subject was discussed in *Toledo, etc., Ry. Co. v. Owen*, 43 Ind. 405, where it was

Terre Haute and Indianapolis Railroad Company v. McMurray.

said: "A general agent is one authorized to transact all his principal's business, or all of his principal's business of some particular kind. A special agent is one who is authorized to do one or more special things, and is usually confined to one or more particular transactions, such as the sale of a tract of land, to settle and adjust a certain account, or the like. That the authority of an agent is limited to a particular kind of business does not make him a special agent. Few, if any, agents of a railroad company do, or can attend to every kind of business of the company, but to each one are assigned duties of a particular kind, or relating to a particular branch or department of the business." Wharton says: "A general agent is one who is authorized by his principal to take charge of his business in a particular line." Wharton Agency, 117. It results from these familiar principles, that the conductor of a train, so far as concerns the direct and immediate management of the train when it is out on the road, is, in the absence of some superior officer, the general agent of the company; but even general agents do not have universal powers, and the authority of such agents is to be deduced from the facts surrounding the particular transaction. 2 Greenl. Ev., §§ 64-64a. In some instances then the conductor is the general agent of the company, and we think it clear upon principle and authority, that he is such an agent for the purpose of employing surgical assistance where a brakeman of his train is injured while the train is out on the road, and where there is no superior officer present, and there is an immediate necessity for surgical treatment. A conductor cannot be regarded as having authority to employ a surgeon when the train is not on the road under his control, or where there is one higher in authority on the ground, or where there is no immediate necessity for the services of a surgeon.

The rule which denies a recovery where there is mutual negligence applies only between the immediate parties. The courts do not extend the rule to cases where the defendant's negligence and that of a third person concur in producing the injury. Thus if two trains come into collision and the managers of both are negligent, an action may nevertheless be maintained by a passenger. *Pittsburgh, etc., R. Co. v. Spencer*, 98 Ind. 186. So if a man is riding with another and is injured by a collision occurring through the concurrent negligence of the driver of the vehicle and the servants of a railroad train engaged in running it, he may recover, notwithstanding the contributory negligence of the driver of the

Terre Haute and Indianapolis Railroad Company v. McMurray.

vehicle in which he was riding *Town of Albion v. Hetrick*, 90 Ind. 545; s. c., 46 Am. Rep. 230; *Robinson v. New York Cent., etc., R. Co.*, 60 N. Y. 11; s. c. 23 Am. Rep. 1; *Wabash, etc., Ry. Co. v. Shacklet*, 105 Ill. 364; s. c., 44 Am. Rep. 791; *Masterson v. New York Cent., etc., R. Co.*, 84 N. Y. 247; s. c., 38 Am. Rep. 510; *Cuddy v. Horn*, 46 Mich. 596; s. c., 41 Am. Rep. 178; *Bennett v. New Jersey, etc., Co.*, 36 N. J. L. 225; s. c., 13 Am. Rep. 435.

The doctrine of contributory negligence is by some authorities based on the principle that a man must not cast himself into danger, and by others upon the principle that one who is himself in fault cannot invoke assistance from the courts against another who shares the fault with him. *Butterfield v. Forrester*, 11 East, 60; 1 Thomp. Neg. 485. Other authorities put the doctrine on the ground that the interests of the whole community require that every one should take such care of himself as can reasonably be expected of him. Shear. & Redf. Neg., § 42. It is obvious that whatever be deemed the true basis of the doctrine, it cannot apply where the case goes beyond the plaintiff himself, or what in law is the same thing, his agent or servant. It is therefore plain that where a surgeon sues for professional services rendered at the request of the agent of a railroad corporation, no question of contributory negligence is involved. This is manifestly the practical, just and reasonable rule. It cannot be expected that a surgeon summoned to attend a case of pressing need shall be required to stop and investigate the causes of the accident, and thus take upon himself the functions of judge and jury. It is but just that he should be deemed entitled to rely on the statement of the corporate agent. Where a principal puts it in his agent's power to exercise apparent authority, the man who in good faith acts upon the statements of the agent should be protected. *Cruzan v. Smith*, 41 Ind. 288. The Supreme Court of Kansas, in a case not unlike the present, said: "The defendant in error was not compelled to institute inquiry as to the moral or legal liability of the railroad company to take care of the disabled employee before receiving him into his hotel, after the general agent of the company had agreed that the company would pay for the board and service." *Atlantic, etc., R. Co. v. Reisner*, 18 Kans. 458.

The employment of a surgeon is not an acknowledgment of a liability to the injured servant, nor can any admission be tortured

Terre Haute and Indianapolis Railroad Company v. McMurray.

from such an act. Evidence of such an employment would be incompetent in an action by the servant, and no admission can therefore be implied. The employment of a surgeon is nothing more than an act of humanity and justice demanded of a railroad company in behalf of a servant injured in its service.

Judgment affirmed.

ZOLLARS, C. J., dissents on the ground that it is not sufficiently shown that the conductor had authority to bind the company by his contract with appellee.

ON PETITION FOR A REHEARING.

ELLIOTT, J. Counsel for the appellant misconceive the drift of the reasoning in our former opinion as well as the conclusion announced. We did not decide that a corporation was responsible generally for medical or surgical attention given to a sick or wounded servant; on the contrary, we were careful to limit our decision to surgical services rendered upon an urgent exigency, where immediate attention was demanded to save life or prevent great injury. We held that the liability arose with the emergency and with it expired.

We did hold that where the conductor was the highest representative of the corporation on the ground, and there was an emergency requiring immediate action, he was authorized to employ a surgeon to give such attention as the exigency of the occasion made imperiously necessary; but we did not hold that the conductor had a general authority to employ a surgeon where there was no emergency, or where there was a superior agent on the ground. We think our decision was well sustained by the authorities there cited, and that it is further supported by the reasoning in *Chicago, etc., Ry. Co. v. Ross*, 112 U. S. 377, and *Pennsylvania Company v. Gallagher*, 40 Ohio St. 637; s. c., 48 Am. Rep. 689.

If the conductor, who is the superior agent of the company on the ground, cannot represent the principal so far as to employ a surgeon to render professional services to an injured servant, and prevent the loss of life or great bodily harm, then it must be said, as it was said by the Supreme Court of the United States in *Chicago, etc., Ry. Co. v. Ross*, *supra*, that "If such conductor does not represent the company, then the train is operated without any representative of its owner."

The decision in *Louisville, etc., R. Co. v. McVay*, 98 Ind. 391,*

* *Post*, 770.

Stoner v. Pennsylvania Company.

is not in conflict with our conclusion in the present case. There the roadmaster was not the superior agent within reach, and there was no emergency demanding immediate action. These are features which very essentially distinguish the two cases. We held in this case a doctrine held in the case cited, namely, that the conductor or other subordinate agent has no general authority to employ a surgeon for a sick or wounded servant of the company; but we also held that where the conductor, in control of the company's train and its brakemen, is the highest agent on the ground, he does possess an authority commensurate with an existing and pressing emergency. It seems clear to us, upon principles of fair justice and ordinary humanity, that some one must possess authority to meet an urgent exigency by employing surgical aid to save from death or great and permanent injury a servant under his control. As the reasoning in the McVay case clearly shows, there is still another material difference between the two cases, and that is this: There the roadmaster appeared to only have authority over the repairs of the road; while here it appears that the conductor had charge of the injured servant, and was the highest officer of the corporation capable of acting as its representative in the emergency which had so suddenly arisen.

So far as concerns the general principle involved there is no conflict, but rather harmony, for the McVay case clearly recognizes the doctrine that the highest agent capable of acting for the company may employ surgical aid in the proper case.

Petition overruled.

STONER V. PENNSYLVANIA COMPANY.

(98 Ind. 384.)

Negligence — contributory — boarding railway train.

It is not necessarily negligent for a passenger to board a railway train at a place other than the station platform.*

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

P. H. Jewett, C. L. Jewett and H. E. Jewett, for appellant.

F. Stansifer and W. D. Stansifer, for appellee.

* See *Eppendorf v. Brooklyn, etc., R. Co.* (69 N. Y. 195), 25 Am. Rep. 170.

Stoner v. Pennsylvania Company.

HAMMOND, J. Complaint in two paragraphs by the appellant, a minor, who sues by his next friend, to recover damages for an injury received while a passenger on the appellee's railroad train. The appellee answered in two paragraphs. The first was the general denial; to the second, the appellant's demurrer for the want of facts was overruled, and an exception taken. Trial by jury; verdict and judgment for the appellee. The overruling of the demurrer to the special paragraph of answer is the only error assigned in this court.

It is averred in both paragraphs of the complaint, that on the 24th day of December, 1881, the appellee was operating a railroad for the conveyance of passengers for hire, called the Jeffersonville, Madison and Indianapolis railroad, extending from Jeffersonville to Indianapolis, and, in its course, passing through the towns of Memphis and Vienna, in this State; that on the day above mentioned, the appellant took passage upon one of the appellee's passenger trains at said Memphis to go to said Vienna; that he was forcibly thrown from said train of cars upon the track of the railroad and both his legs run over by the wheels of the train, causing him great pain and suffering, the loss of both his feet by amputation, and great expense. The paragraphs are substantially the same except in the statement as to the manner in which the accident occurred. The first paragraph of the complaint sets out the particulars of the occurrence as follows: "That by the carelessness, negligence and want of skill of the persons employed by the defendant as its servants, and as such in charge of said train, said train was started and jerked forward with great, unnecessary and unusual force and violence, by reason of which forcible and violent starting of the said train, the plaintiff, while using due care, and without fault or negligence upon his part, was forcibly thrown from said train of cars and upon the track of said railroad."

The second paragraph of the complaint, after stating that the appellant applied for a ticket at the office of the appellee, at the said town of Memphis, avers, "that he" (the plaintiff) "was unable to procure any such ticket for the reason the said office was closed; that at the time he so sought to purchase a ticket to said Vienna station, a train of defendant's cars, which carried passengers to said Vienna station, was standing still upon the track of said railroad at Memphis, and the locomotive, which had been drawing said train, was detached therefrom and some distance away from the

Stoner v. Pennsylvania Company.

cars composing said train. And the plaintiff avers that he waited for said ticket office to open until a few minutes of the time said train was to start, when he went to the car in which passengers were carried upon said train and took passage upon said train for said town of Vienna, having money sufficient to pay, and intending to pay, his fare upon said train ; that plaintiff started to go into said car while the same was motionless upon the track aforesaid, and while, in the exercise of due care on his part, he was ascending the steps leading to the rear platform of said car, the servants of the defendant in charge of said train of cars, running and managing the same, negligently, carelessly and unskilfully and without any notice or warning of their intention so to do, ran said locomotive and other cars with great, unusual and unnecessary force and violence against the car upon which the plaintiff then was, thereby causing said car to start with great and sudden force and violence, by reason of which sudden starting the plaintiff was jerked from said steps and platform and thrown violently upon said railroad.

* * * The plaintiff avers that said shock, concussion and sudden starting of said car was caused and the defendant [plaintiff?] was jerked from his said position and thrown under said car and injured through no negligence or fault of the plaintiff whatever, but that the same occurred wholly through the fault, negligence and unskilfulness of the defendant and defendant's servants in charge of, and engaged in running said train."

The only question in the case for our decision arises upon the overruling of the appellant's demurrer to the second paragraph of the appellee's answer. The paragraph of answer referred to is as follows :

"The defendant, for answer to complaint, says : * * * 2d. The first and second paragraphs of plaintiff's complaint relate to one and the same transaction, and plaintiff received his injuries in attempting to board said train, and not other or different. It is averred that at said Memphis at said time and for a long time prior thereto, there was a platform at defendant's depot for the use of passengers departing from and arriving at said Memphis, from and on which to board trains and alight therefrom at said station. Plaintiff did not attempt to board said train from said platform, but at a point, to-wit, one hundred yards south thereof, and where there was no platform. It is averred that neither defendant nor its said agents and employees in charge of said train had any

Stoner v. Pennsylvania Company.

knowledge or notice whatever that plaintiff would attempt to board said train at said place."

The above pleading, it will be observed, does not deny that the car was not in motion when the appellant attempted to enter it. Neither does it deny that the appellant was injured as stated in his complaint, nor that the appellee's employees were guilty of the acts of negligence charged against them. These averments of the complaint, with respect to the second paragraph of the answer, are therefore to be taken as admitted. Section 383, R. S. 1881. The manifest object of this paragraph of answer was to defeat the appellant's recovery by showing contributory negligence upon his part in the injury of which he complains. If it was sufficient for this purpose, the demurrer thereto was properly overruled, for the law is well settled that in actions to recover damages for injuries occasioned by negligence, the plaintiff must fail if his own want of care contributed to the wrong complained of. *Toledo, etc., Ry. Co. v. Brannagan*, 75 Ind. 490. But does the affirmative paragraph of answer, in this case, allege facts from which, as a matter of law, contributory negligence must be inferred? The substantial averment in the answer is that at the town of Memphis, at the time of the accident, there was a platform at the appellee's depot for the use of passengers, but that the appellant did not attempt to go on the train from said platform, but at a place one hundred yards therefrom, of which neither the appellee nor its employees in charge of the train had notice.

We cannot declare that as a matter of law the entering a passenger train to take passage at a railroad station from a place other than the platform provided for that purpose is an act necessarily contributing to an injury received while thus taking passage. Negligence is usually a mixed question of law and fact—a fact to be found by the jury under the instruction of the court. The court may not declare an act to be negligence unless the act is such as all reasonable men would be likely to draw an inference of negligence from it. If the inferences are doubtful, the question is one of fact for the jury. *Pierce Railroads*, 314.

The appellee's answer does not state that at the time named the train stopped at the platform. It does not aver that the appellee was not in the habit of receiving and discharging passengers at the place the appellant attempted to take passage, as well as at its platform. In *Keating v. New York, etc., R. Co.*, 49 N. Y. 673, it was

Stoner v. Pennsylvania Company.

held that when a railroad company has been in the habit of receiving and discharging passengers at places other than its depot, it is not negligence for passengers to get on or off at such places while the train is not in motion, and there is no apparent danger. And in *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145, a passenger of his own accord had got off the train where it stopped to water, about 250 feet from the station-house. The night of the occurrence was very dark, and he received an injury by falling into an excavation made for a cattle-guard. It was held that the question of contributory negligence was a proper one for the jury. See also *Mitchell v. Western, etc., R. Co.*, 30 Ga. 22. Cases there are, no doubt, where the circumstances make the taking of passage on a railroad train at a place not provided for that purpose, such an act of negligence as precludes the recovery for an injury thereby occasioned. *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440, was a case of this kind. There the railroad had a platform south of the track. The plaintiff, a woman, after night when it was quite dark, attempted to enter the train from the north side of the track, just as the train was starting, and fell and was injured. She was not observed by the conductor, whose attention was directed to the care of passengers on the platform side of the track. It was held that the railroad was not responsible. It does not appear in that case but that the train stopped at its usual time and started in a usual manner; in fact no act of negligence upon the part of the railroad employees appears to have been shown in that case.

We think the appellant must, under the facts stated in his complaint, and not controverted by the second paragraph of the answer, be regarded as having been a passenger at the time of the accident. There is no averment of any regulation of the company which required passengers to procure tickets before taking the train. And had there been such a regulation in this case the appellant was excusable for not complying with it after a proper but unsuccessful effort to obtain a ticket. *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; s. c., 10 Am. Rep. 103; *St. Louis, etc., R. Co. v. Myrtle*, 51 Ind. 566. A person who by mistake gets on a passenger train, other than the one he intended to take passage on is a passenger upon the train which he is on. *Columbus, etc., Ry. Co. v. Powell*, 40 Ind. 37. There is no averment in the pleadings from which it appears that the place where the appellant boarded the train was dangerous or that there was any regulation or custom of the company

Stoner v. Pennsylvania Company.

which did not permit persons to take passage on trains at Memphis station except at the platform. From the facts disclosed in the record we are of the opinion that the appellant became a passenger the instant he stepped upon the train, and that upon the payment or tender of his fare he could not legally have been ejected simply because he did take passage from the platform. Being thus a passenger the company was liable for an injury resulting to him from the negligence of its servants, unless his own negligence contributed thereto. The complaint avers that he was without fault or negligence. This averment is not negatived by the second paragraph of the answer. It states that the appellant received his injury while attempting to board the train one hundred yards south of the depot but it charges no carelessness upon his part in so boarding the train, nor that such act of his in any way contributed to his injury. Herein the special answer is manifestly and fatally defective.

A question quite similar to this was before this court in *Lafayette, etc., R. Co. v. Sims*, 27 Ind. 59. That was an action to recover damages for an injury to a passenger. The opinion states that "The defendant answered that the train on which the appellee was at the time of the injury was a passenger train; that on all the passenger cars printed notices that 'passengers are forbid standing on the platform,' were and always had been posted; that the appellee for five years had been in the habit of riding in the passenger cars of the appellant where such notices were so posted in conspicuous places, and had notice of such regulation; that at the time of said accident he was riding upon the platform of one of the passenger cars and not in the car; that said platform was and always is a dangerous place; that at the time of said accident said appellee was on said platform, and immediately before said accident had been sitting on the brake on said platform, against the will of said appellant; wherefore the appellant says that whatever injury the appellee sustained was the result of his own carelessness and wrong in being in an improper and dangerous place at the time said accident occurred, and from which the injuries complained of resulted."

Commenting on the above answer in that case the court said: "It will be observed that the answer does not allege as a matter of fact that the appellee was injured by reason of his position on the platform of the car, but simply avers that he was informed of the rule prohibiting passengers from sitting on the platform; that

Louisville, Evansville and St. Louis Railway Company v. McVay.

he was on the platform at the time of the accident and that the platform was always a dangerous place. These are all the facts alleged, and from these facts the appellant concludes that the position of the appellee caused his injury. This conclusion of course adds nothing to the answer." And again in the same case it was further said: "An averment that a passenger occupied a dangerous position upon the train does not authorize the pleader to draw the conclusion that therefore the injury 'was the result of his own carelessness and wrong.' The conclusions from the facts are to be drawn by the court or jury, and an averment would have better served the purposes of a plea. The facts alleged in the answer may be true, and yet not inconsistent with the averment in the complaint that the injury resulted from the negligence and carelessness of the appellant and without the fault of the appellee."

In the case before us, the special paragraph of answer does not state facts from which the court must conclude as a matter of law that the appellant was guilty of negligence in attempting to take passage at the place in question; nor is there any averment that his own want of care in there boarding the train, or any other act of his, contributed to his injury. The affirmative paragraph of the answer was insufficient.

Judgment reversed at the appellee's costs, with instruction to the court below to sustain the appellant's demurrer to the second paragraph of the answer and for further proceedings.

Judgment reversed.

LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILWAY COMPANY
v. McVAY.

(98 Ind. 391.)

Master and servant — authority of railway road-master to contract for care of injured person.

A railway road-master, having charge of the repairs the roadway, has no implied authority to contract for the nursing of a person injured on the line of the road, there being no emergency calling for immediate action, and there being a superior agent within reach; but the corporation will be bound by the ratification of such contract by the general manager.*

* See ante, 752.

Louisville, Evansville and St. Louis Railway Company v. McVay.

ACTION for services. The opinion states the case. The plaintiff had judgment below.

A. Dowling, for appellant.

J. V. Kelso, for appellee.

ZOLLARS, C. J. The only question in this case is as to the sufficiency of the evidence to sustain the finding and judgment of the court below against the appellant. The substance of the evidence is as follows: In 1882, one John Barnett was badly injured and mangled at a tunnel on the line of appellant's railway. He was removed to a hotel and appellee was employed by a Mr. Seemans, one of appellant's road-masters, to nurse and care for him. In pursuance of that employment appellee performed the service for some eighty days. After he had been thus employed for some seventy days he was authoritatively notified that the road-master had ordered his wages reduced to \$1.50 per day. A few days subsequent he was notified that the road-master had ordered his discharge, and that the discharge would bring the pay for the services rendered. After he had rendered about sixty days of service under the employment he presented his bill to Mr. Snyder, the general manager of the company, who after having asked who employed him, said that he would inquire about the matter and see Mr. Seemans, the road-master. Subsequent to this Mr. Seemans asked appellee to reduce his bill to \$1.50 per day, and promised that if he did so he, Seemans, would make it all right. At about the time appellee was employed the same road-master employed a physician, who attended the wounded man during the time appellee acted as nurse, and was paid for such attendance by appellant, the railway company. Another nurse whom the physician employed through appellee, and whose time appellee kept and reported to the company, was paid at the general office of the company in Louisville. Appellee got medicines for the wounded man from the druggist, who was paid for the same by the company. After the services were rendered by appellee, his attorney wrote to the general manager of appellant and received the following answer:

“LOUISVILLE, KY., *January 5, 1883.*

“J. V. KELSO, Esq., New Albany:

“DEAR SIR—Your yesterday's favor, with inclosure, at hand. Mr. Peter McVay, I think, was employed as nurse at the rate of

Louisville, Evansville and St. Louis Railway Company v. McVay.

\$1.25 per day, and at this rate I am willing to pay him for services actually rendered up to the time that he was relieved by our roadmaster; am willing to pay him no more. If Mr. McVay wishes to bring suit, I have no means of preventing him from so doing. The indorsement of O. N. Nutt, as attending surgeon, I don't think adds to the strength of the bill as Mr. Nutt was not employed by this company.

“Yours truly,

WM. SNYDER,

General Manager.”

It will be observed that there is no evidence here of any authority on the part of the roadmaster to make the contract for the nursing. If such authority may not be inferred from the title “roadmaster” there is nothing to show that he had authority to bind the corporation. In a strictly legal sense, the board of directors of a railway company are the agents and representatives of the corporation. In a practical sense, the board of directors become the corporation itself, so far at least as its relations to the public are concerned. *Pierce Railroads*, 24 and 32, and cases cited; *Ang. and A. Corp.*, §§ 239, 280, 299; *Columbus, etc., Ry. Co. v. Arnold*, 31 Ind. 174.

Whatever authority any agents, officers or employees may have they must have derived from the board of directors, or governing body, unless conferred by the charter of the corporation. Before the corporation will be bound by the contracts of such agents, officers or employees, unless authority is conferred by the charter, it must be shown that authority to so contract has been given by the board of directors or governing body, either expressly, impliedly or by ratification. Section 3897, R. S. 1881; *Brooklyn Gravel Road Co. v. Slaughter*, 33 Ind. 185; *Pierce Railroads*, 34, and cases cited; *Adriance v. Roome*, 52 Barb. 399.

It is well settled that the corporation will be bound by the acts and omissions of its agents, officers and employees within the line and scope of the agency, office or employment, and that when such acts or omissions are shown to have been within the line and scope of the agency, office or employment, no further evidence of authority will be required to bind the corporation. Such authority, in such cases, will be presumed from the nature of the duties imposed upon the agent, officer or employee. But in order that this presumption may be indulged, it must in some way be known what

Louisville, Evansville and St. Louis Railway Company v. McVay.

these duties are. *Pittsburgh, etc., Ry. Co. v. Ruby*, 38 Ind. 294; s. c., 10 Am. Rep. 111; *Ohio, etc., Ry. Co. v. Collarn*, 73 Ind. 261; s. c., 38 Am. Rep. 134; *Lafayette, etc., R. Co. v. Ehman*, 30 Ind. 83; *Williams v. Cammack*, 27 Miss. 209; *Pierce Railroads*, 277.

Whether or not the courts may, in any case, presume authority on the part of these several subordinates to bind the corporation in the manner they may have undertaken to do, or take judicial notice of the authority from the title given to the agent, officer or employee, we shall have occasion to determine hereafter.

It is very clear, upon authority and reason, that there is nothing in the ordinary meaning of the term "roadmaster," from which the courts may know or presume that such employee has authority to bind the company for attendance and nursing of a person injured upon the line of the railroad, whether such person, when injured, be an employee, passenger, or a person sustaining no relation to the corporation. And could the courts judicially know that the roadmaster is a person having charge of the repairs of the road, still they could not judicially know, or presume from this, that he has authority to bind the corporation for the nursing of persons injured upon the road, whether by trains or otherwise. *City of Lafayette v. James*, 92 Ind. 240; s. c., 47 Am. Rep. 140.

The case of *Tucker v. St. Louis, etc., Ry. Co.*, 54 Mo. 177, was an action by a physician against the company to recover for surgical and medical treatment of a brakeman injured while on duty. He was employed by the section agent and the conductor of the train. It was held that he could not recover. After stating that there was no evidence that they had any authority to employ the physician on the corporation's account, the court said: "It is only shown that they were agents of defendant in conducting its railroad business; which of itself could certainly give them no authority to employ physicians, for the defendant, to attend to, and treat persons accidentally injured on the road."

The case of *Brown v. Missouri, etc., Ry. Co.*, 67 Mo. 122, was an action for drugs to a woman who had been hurt by one of the company's trains. They were furnished upon orders given by a division superintendent. The court said: "No proof was offered as to the duties of such officer, and the courts cannot take judicial notice of them." For want of such proof the judgment was reversed.

In the case of *Mayberry v. Chicago, etc., R. Co.*, 75 Mo. 492, it

Louisville, Evansville and St. Louis Railway Company v. McVay.

was held that the fact, that a physician in the service of a railroad company is authorized to buy medicines on the credit of the company, does not imply a power to bind the company by a contract for board, lodging, attendance and nursing of a brakeman injured on one of the company's trains.

In the case of *Rankin v. New England, etc., Silver Mining Co.*, 4 Nev. 78, it was held that "No one can be held upon a contract executed by another as agent, until it is satisfactorily shown that he possessed the authority to act for the principal in that particular character of transaction," and hence, that the full power of a foreman to employ workmen for the construction of a mill, and pay them for their services, does not include or imply the power to purchase lumber or enter into contracts respecting it.

The case of *Marquette, etc., R. Co. v. Taft*, 28 Mich. 289, was an action by a surgeon against the company for services rendered an employee who was injured while on duty. He was employed by the superintendent and the yard-master who had charge of the business and men in the yard, where the employee was engaged when injured, and who had the right to employ men for all purposes they were required for in the yard, and to discharge them. While the court divided as to the authority of the superintendent, the judges all agreed that under the evidence the yard-master had no authority to bind the company by the employment of the surgeon. The court said: "There is certainly nothing in the evidence respecting the business required of Theil (yard-master), or in his position in the company's service, which suggests his possession of authority to bind by contracts for professional services. He was a mere yard-master, charged with local and very circumscribed duties, and those duties do not appear to have had any connection with the employment of professional assistance for the company." Two of the judges held that without proof of authority on the part of the superintendent, other than that furnished by his title simply, the company was not bound by his employment of the surgeon.

The case of *Cox v. Mullan, etc., Ry. Co.*, 3 Exch. 268, cited in Wood on Master and Servant, at page 506, section 262, was an action by a physician against the company to recover for attendance upon a person injured by the company's employees. The physician was employed by a station master, who acted as the chief officer of the passenger and other departments. It was held that the company was not liable. PARKE, B., delivering the opinion of the

Louisville, Evansville and St. Louis Railway Company v. McVay.

court, after giving several illustrations to show that the company was not liable, said: "The employer of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances."

In the case of *Atlantic, etc., R. Co. v. Reisner*, 18 Kans. 458, it was said: "The authorities cited sustain the proposition that a station agent of a railroad company is not authorized, by virtue of his position as such agent, to employ a hotel-keeper, at the expense of the company, to attend to one of its brakemen, injured while working for the company, nor to furnish such employees with board and lodging while disabled." The same doctrine is fully recognized in the following cases: *Toledo, etc., Ry. Co. v. Rodrigues*, 47 Ill. 188; *Toledo, etc., Ry. Co. v. Prince*, 50 id. 26; *Cairo, etc., R. Co. v. Mahoney*, 82 id. 73; *Pacific R. Co. v. Thomas*, 19 Kans. 256; *Atchison, etc., R. Co. v. Reeher*, 24 id. 228; s. c., 1 Am. & E. R. R. Cas. 343. See also, 1 Rorer Railroads, 666.

Many more cases to the same effect might be cited. We know of no authority to the contrary, and think none can be found that would hold the company liable upon the contract alone of the road-master, under the circumstances of this case. As there is nothing before us to show that the contract made with appellee by the road-master was within the line of his employment, or that he had authority to represent or bind the corporation by such a contract, we must hold that the corporation is not bound by it, unless it was recognized and ratified by the corporation. That a contract which an agent has no authority to make may be ratified by the corporation, so as to become binding upon it, is well settled by the authorities. If the general manager in this instance had authority to represent and bind the corporation by such contracts, he had authority to ratify the contract made by the road-master. If he had such authority, the evidence here is ample to show that the contract by the road-master was ratified, and thus became obligatory upon the corporation. Here we meet the most important and difficult question in the case. There is evidence sufficient to show that Mr. Snyder was the general manager of appellant, the railway company; but direct evidence that as general manager he had authority to bind the company by such a contract, is wanting. The fact that the druggist, physician and one of the nurses were paid by the company, is some evidence of his authority as to the contracts with them, but it is hardly suffi-

Louisville, Evansville and St. Louis Railway Company v. McVay.

cient, of itself, upon which to base a recovery in favor of appellee. As there is no direct evidence of such authority having been delegated to the general manager by the corporation, so there is no direct evidence as to what his duties as general manager were, from which his authority might be inferred. Can we presume, from the title "general manager," that the duties and powers of the general manager were sufficiently comprehensive to include contracts for the nursing of a person wounded upon appellant's road? The term "general manager" of a corporation, according to the ordinary meaning of the term, indicates one who has the general direction and control of the affairs of the corporation, as contradistinguished from one who may have the management of some particular branch of the business. There is no class of business of any thing like the magnitude of the railroad business of to-day, that is so open to common observation, and of which the general public know so much. The terms road-master, section boss, conductor, station agent, superintendent and general manager, are terms familiar to the whole people, and the public has, in the main, a correct understanding of the ordinary duties of these several classes of officers, agents and employees, and that their duties and powers are limited to the keeping up of the road, rolling stock, etc., and operating the road in the transportation of freight and passengers. We should have to shut our eyes to the most common observation to hold that the courts will not presume that the "general manager of a railway has authority to bind the corporation by contracts for medical and other services to an injured employee, passenger, or other person wounded on the road by any agency of the company.

Different section bosses or road-masters may have different duties imposed upon them, and be clothed with different powers, by different corporations. The same, probably, may be said of superintendents. Possibly the same may be said of "general managers," but this term indicates a general control and direction of all matters connected with the operation of the road, and until the contrary is shown, the presumption ought to be indulged by the courts that such an officer has authority to care for the wounded persons above mentioned. In many cases it would be difficult to have action by the board of directors; and in many cases, if prompt and efficient measures were not adopted, the corporation might be subjected to additional damages. It has been held that the courts will take notice of the duties and powers of cashiers of banks. *Farmers, etc., Bank v. Troy City Bank*, 1 Doug. (Mich.) 457.

Louisville, Evansville and St. Louis Railway Company v. McVay.

In the case of *Sturges v. Bank of Circleville*, 11 Ohio St. 153, the court said : “It is not claimed that the respective duties of the board of directors, president and cashier, in the exercise of the franchises of the bank, are prescribed by the charter. So far therefore as the limitation of the appropriate duties of the cashier depend upon his office, we can only have respect to the ordinary and well understood duties of that officer in determining his powers. A cashier is defined to be one who has charge of money, or who superintends the books, payments and receipts of a bank or moneyed institution. His actual powers and duties, like those of all other agents, may be more or less qualified, restricted or enlarged by the corporation, institution or party for whom he acts. But in this case, there being nothing to show any restriction or qualification of his powers in that regard, the duties of the cashier may reasonably be understood to extend to the buying and selling, and negotiating bills of exchange, checks and promissory notes, as well as to that of borrowing money, as the agent of the bank,” etc. These cases were cited approvingly in the case of *Tousey v. Taw*, 19 Ind. 212. If the courts may thus take notice of the duties and powers of cashiers of banks, we can think of no reason why they should not presume, from the title, that general managers of railways have power and authority to bind the corporation by a contract such as that under discussion.

In the case of *New Albany, etc., R. Co. v. Haskell*, 11 Ind. 301, it was held that the corporation was liable upon a contract for fencing the road, made by a general superintendent of the corporation. There seems to have been no evidence of his duties other than could be inferred from the title “general superintendent.” The court said: “He was the general superintendent of the road, and of course the general agent of the company, and as such, it may be fairly presumed that he was clothed with authority to bind his principal in contracts relative to the safe and effective operations of the road. Railroad companies, in all cases, contract through their agents. The law makes it their interest to fence their track. * * * And upon whom, more than such general agent, would the duty of making a contract similar to the one in suit appropriately rest? In the absence of conflicting evidence, we are not allowed to avoid the conclusion, that the agent, in this instance, acted within the scope of his authority.” We have many cases of what may be presumed by the courts, and of what they will take notice without proof.

Louisville, Evansville and St. Louis Railway Company v. McVay.

The following are not directly in point upon the exact question under examination, but they are analogous, and serve to throw light upon it: *Carmon v. State*, 18 Ind. 450; *Ward v. Colyhan*, 30 id. 395; *Manning v. Gasharie*, 27 id. 399; *Hipes v. Cochran*, 13 id. 175; *Indianapolis, etc., R. Co. v. Stephens*, 28 id. 429; *Indianapolis, etc., R. Co. v. Case*, 15 id. 42; *Ross v. Boswell*, 60 id. 235; *Abshire v. Mather*, 27 id. 381; *Abel v. Alexander*, 45 id. 523; s. c., 15 Am. Rep. 270; *Eagan v. State*, 53 Ind. 162; *Schlicht v. State*, 56 id. 173; *Wiles v. State*, 33 id. 206; *State v. Swift*, 69 id. 505; *Board, etc., v. May*, 67 id. 562; *United States Ex. Co. v. Keefer*, 59 id. 263; *Buell v. State*, 72 id. 523; *Terre Haute, etc., R. Co. v. Pierce*, 95 id. 496; *Stout v. State*, 96 id. 407; *Myers v. State*, 93 id. 251.

In the case of *Atlantic, etc., R. Co. v. Reisner, supra*, without proof of the duties and powers of the general agent, the company was held liable upon his contract with a hotel keeper for board and attendance to a brakeman, injured while working for the company. It was said: "In the case of a general agency, the principal holds out the agent to the public as having unlimited authority as to all his business. When the witness testified that Hyde was the general agent of the road at Atchison, he thereby gave evidence that the railroad company held out to the public such person as its agent in all its business and employment. In other words, the general agent of the company is virtually the corporation itself. * * * General manager and general agent are synonymous terms." The same doctrine was held in the case of *Atchison, etc., R. Co. v. Reeher, supra*.

The case of *Toledo, etc., Ry. Co. v. Rodrigues, supra*, was an action to recover for nursing an injured employee. The nurse was employed by the local station agent, who by letter notified the general superintendent of the road of the employment. To this letter there was no answer nor was the employment otherwise disapproved. When the bill was presented the general superintendent said that he would pay reasonable charges, and based his objection only upon the amount of the bill. It was held that this amounted to a ratification of the contract by the agent and bound the company. In speaking of the general superintendent the court said: "As his title implies, he has a general superintendence of the business affairs of the road and we deem it but a reasonable inference to conclude that this was within the scope of these powers and that when

Louisville, Evansville and St. Louis Railway Company v. McVay.

exercised the company must be held liable." Because the regulations are not open to the public it would be unreasonable to require positive proof of such authority.

The case of *Terre Haute, etc., R. Co. v. Pierce, supra*, was an action by a surgeon to recover for amputating the leg of an employee, injured while at work for the company. The facts of the employment and report to the general superintendent were almost identical with the case last above. It was held that the company was liable upon the ground of ratification. There was no proof of the duties or powers of the general superintendent. The court seems to have presumed from the title of his office, that he had authority to bind the company for such surgical services.

The case of *Indianapolis, etc., R. Co. v. Morris*, 67 Ill. 295, was similar except that the action was to recover for nursing and care, and the employment was by the conductor, who reported to the general officers. It was held that there was a ratification of the employment, and that the company was liable.

Under a similar state of facts, a like ruling was made in the case of *Cairo & St. Louis R. Co. v. Mahoney*, 82 Ill. 73. In the case of *Pacific R. Co. v. Thomas*, 19 Kans. 256, it was held that in the absence of evidence to the contrary it should be presumed that the general superintendent of a railway has authority to employ physicians and surgeons to attend an employee injured while working for the company, and hence power to ratify an employment by agents who had no such authority. This case went further than we need go here, and announced a proposition that we need not now approve or disapprove, viz., that the same presumption should be indulged as to a division superintendent, upon whose division the injury occurred. The company was held liable upon the ground that the employment was ratified by the superintendent. The evidence of ratification was much weaker than in the case before us.

The doctrine of the above cases is fully sustained by the case of *Southgate v. Atlantic, etc., R. Co.*, 61 Mo. 89, and the case of *American Ins. Co. v. Oakley*, 9 Paige, 496; 38 Am. Dec. 561, therein cited. Upon the general doctrine of what the courts take notice without proof, see 1 Best Ev., § 253; Whart. Ev. 1, § 330 *et seq.*, and cases cited.

Applying the doctrine of the above authorities to the case before us, it must be held that the general manager had authority to

Carter v. Louisville, New Albany and Chicago Railway Company.

make the contract with appellee, and hence authority to ratify the contract as made by the road-master; and that he did so ratify it and thus made the corporation liable. There is no evidence as to how Barnett was injured; but inasmuch as the general manager ratified contracts for taking care of him, and the company paid for such service (except the claim of appellee) it should be presumed — there being no evidence to the contrary — that the injury was so inflicted as that the contract for his care was not *ultra vires*. See *Board, etc., v. Slatter*, 52 Ind. 171; *City of Anderson v. O' Connor*, 98 id. 168.

There is nothing in the evidence that would justify us in reversing the judgment because of an excessive recovery.

We have given to the questions involved in this case a thorough and extended examination, not on account of the amount involved, but on account of the importance of the questions. As we find no available error in the record, the judgment is affirmed with costs.

Judgment affirmed.

CARTER V. LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

(33 Ind. 532.)

Master and servant — servants ejecting trespasser from locomotive engine.

Where a trespasser upon a railway locomotive engine was thrown off by the servants of the railway company, while the engine was moving at a dangerous speed, and run over and injured, the company is liable therefor.

ACTION for personal injuries. The opinion states the case. The defendant had judgment below.

B. F. Love, H. C. Morrison, T. B. Adams, L. T. Michener, G. S. Orth and J. Park, for appellant.

J. R. Croffroth, T. A. Stuart, S. P. Baird and W. F. Stillwell, for appellee.

Carter v. Louisville, New Albany and Chicago Railway Company.

MORRIS, C. This is a suit for damages commenced by the appellant against the appellee for a personal injury, alleged to have been caused by the wrong of the appellee. The complaint contains four paragraphs.

It is stated in the first paragraph of the complaint that on the 24th day of July, 1877, the appellee was running and operating a railroad located in Tippecanoe county; that it was running engines and cars on its said road, and that it was, at the same time, using and running an engine on a side track of said road, in and near the city of Lafayette, in said county, in and about the transaction of its business; that while engaged in running and operating said engine on said side track in and about its said business, and when said engine was not in motion, the appellant and others, with the knowledge of and without objection from the servants of the appellee having charge of said engine, got on to the same; that while the appellant was so on said engine, and seated in the front part of the same, under the head-light thereof, said servants of the appellee, having charge of said engine, put the same in motion on said side track, and while said engine was running at a rate of speed that made it unsafe for the appellant to get off of the same, one of said servants ordered him off, to which he replied that he would get off if they would stop the engine so that he could safely do so; that thereupon, without checking the speed of the engine, the said servant shoved him off of said engine on to said side-track and in front of the engine, in such position that his left leg came in contact with the rail of said track; that the wheels of said engine passed over the appellant's left leg, crushing the bones thereof so that it became and was necessary to amputate his said leg some four inches below the knee; that he suffered great pain and was put to great expense, etc.

The second paragraph of the complaint is like the first, except that the statement that the appellant got upon the engine with the knowledge and without objection from the appellee's servants having charge of said engine, is omitted. It states that one of the appellee's servants having charge of said engine seized the appellant and negligently threw him from said engine. In other respects they are the same.

The third paragraph is in substance the same as the first; it states that the appellant got on the engine with the knowledge and notice of the appellee; that the appellee, through its servants and while the engine was in motion, shoved the appellant off, etc.

Carter v. Louisville, New Albany and Chicago Railway Company.

The fourth paragraph is the same as the third except that it states that the appellee negligently and carelessly pushed the appellant from the engine.

The appellee demurred separately to each paragraph of the complaint, on the ground that neither states facts sufficient to constitute a cause of action. The court sustained the several demurrers, and the appellant electing to stand by his complaint, final judgment was rendered for the appellee.

The errors assigned bring in question the rulings of the court upon the demurrers to the complaint.

The appellee contends that each paragraph of the complaint is fatally defective, because neither shows it to have been in fault; that upon the facts stated it is not responsible for the acts of those who threw the appellant from the engine; that those who threw or pushed the appellant off the engine are not alleged or shown to have been acting within the scope of their employment.

It may be safely assumed, we think, that the appellee was upon the facts stated in each paragraph of the complaint wrongfully upon the appellee's engine. He must have known that the position which he had voluntarily taken and occupied upon the engine—in the front portion of it under the head-light—was a dangerous and improper one. He is not alleged to have been invited by the appellee or its servants to occupy this position of danger. The use of the engine, its construction and obvious design, unmistakably notified the appellant that it was not intended for the purpose for which he was improperly using it. He was voluntarily and wrongfully upon the engine and therefore took upon himself whatever risks and perils not occasioned by the wrongful acts of those in charge of the engine might attend the position which he had assumed. Nor does the fact that the appellant was thus upon the engine with the knowledge of and without objection from those in charge of it, excuse, much less justify, his conduct. The knowledge of the appellee's servants and their failure to object will under the circumstances stated in the complaint hardly warrant the inference that the appellee had authorized such servants to assent to and approve for it the conduct of the appellant. The engine itself, its uses and obvious design, were a warning and protest against the conduct of the appellant which he was not at liberty to ignore or disregard. He could not without negligence assume the position which he avers he did, so obviously dangerous, even

Carter v. Louisville, New Albany and Chicago Railway Company.

with the permission of those in charge of the engine. *Robertson v. New York, etc., R. Co.*, 22 Barb. 91.

Though wrongfully upon the appellee's engine, the appellant did not thereby assume the risks to his person that might be caused by the wrongful acts of the appellee's servants, and if such acts were expressly or constructively authorized by the appellee, it must be held to be liable for their consequences. It is averred in each paragraph of the complaint, that one of the appellee's servants pushed the appellant from the engine while it was moving at a rate of speed which rendered it dangerous for him to get off of it; that he fell in front of it and on the rail of the track, and was injured by the wheels of the engine passing over his leg. Though wrongfully upon the engine, the appellant was not an outlaw, nor did he thereby assume the risks to his person caused by the alleged conduct of the servants of the appellee. He assumed the risks incident to his own wrong, but not those incident to or directly resulting from the wrongful act of the servant. To push or throw the appellant from his position on the engine, while it was running at a speed that made it dangerous for him to get off, was an act, not of omission, of mere negligence, in the sense in which the word is used in the case of *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, and other cases referred to by the appellee, but of reckless aggression, evincing a wanton indifference to consequences and willingness to inflict injury.

The appellee contends that unless it is alleged or shown that the acts of its employees were willful or purposed, the complaint is bad, because there was negligence on the part of the appellant. Grant this, though we do not decide it, yet the complaint shows that those in charge of the engine were guilty of something more than mere negligence, as that word is used in the case of *Pennsylvania Co. v. Sinclair*, *supra*, relied upon by the appellee. There was, according to the averments, that "something more than mere negligence," which evinces willfulness, a purpose to injure. Here the injury was the direct result of the aggressive act of the appellee's servant. The act of pushing the appellant off the engine was the proximate cause of the injury. The wrong of the appellant was not proximate to the injury so as to preclude his right to recover. True, if he had not been upon the engine, he would not have been thrown from it; but though wrongfully upon the engine, had he been let alone, or properly removed from it, he might not have

Carter v. Louisville, New Albany and Chicago Railway Company.

The fourth paragraph is the same as the third except that it states that the appellee negligently and carelessly pushed the appellant from the engine.

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Carter v. Louisville, New Albany and Chicago Railway Company.

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The appellee contends that unless it is alleged or shown that the acts of its employees were willful or purposed, the complaint is bad, because there was negligence on the part of the appellant. Grant this, though we do not decide it, yet the complaint shows that those in charge of the engine were guilty of something more than mere negligence, as that word is used in the case of *Pennsylvania Co. v. Sinclair*, *supra*, relied upon by the appellee. There was, according to the averments, that "something more than mere negligence," which evinces willfulness, a purpose to injure. Here the injury was the direct result of the aggressive act of the appellee's servant. The act of pushing the appellant off the engine was the proximate cause of the injury. The wrong of the appellant was not proximate to the injury so as to preclude his right to recover. True, if he had not been upon the engine, he would not have been thrown from it; but though wrongfully upon the engine, had he been let alone, or properly removed from it, he might not have

Carter v. Louisville, New Albany and Chicago Railway Company.

been hurt. The party who enters a street-car, without intending to pay his fare, is there wrongfully, and may be removed. But if negligently thrown from the car by the owner and injured, no one would doubt the latter's liability. See Whart. Neg., §§ 345 *et seq.*, and notes; Shear. & Redf. Neg., § 264; *Lawrenceburgh, etc., R. Co. v. Montgomery*, 7 Ind. 474; *Howe v. Newmarch*, 12 Allen, 49; *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; s. c., 10 Am. Rep. 103.

Assuming, as we have, that the person who threw the appellant from the engine was the servant of the appellee, and acting within the scope of his employment, we think the complaint is clearly good.

We think it too clear to be seriously questioned that those in charge of and operating the engine of the appellee, in transacting its business, had not only the right to remove from it any person wrongfully upon it, but authority to do so from the appellee. Authority to take charge of and operate the engine would include authority to remove from it any thing or person whose presence upon it might in any way interfere with its use. Such authority is indispensably necessary to enable the servant to transact the business of the master. The question is not as to the manner of the removal, but whether those in charge of an engine may, by authority of the master, because they have control of it, remove from it persons who have wrongfully gotten upon it. Had those in charge of the engine stopped it, and without unnecessary force or violence removed the appellant from it, no one would doubt that they could justify the act as the servants of the appellee. *Indianapolis, etc., R. Co. v. McClaren*, 62 Ind. 566; *Jeffersonville R. Co. v. Rogers*, *supra*. In the latter case it is said: "If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent; * * or even if it is contrary to an express order of the master." It can hardly be questioned, we think, that the removal of a person wrongfully upon an engine is within the scope of the employment of those to whom its care, management and control have been intrusted. Wood Mast. and Ser. 587, 655, 656; *Evansville, etc., R. Co. v. Baum*, 26 Ind. 70; *Noblesville, etc., G. R. Co. v. Gause*, 76 id. 142; s. c., 40 Am. Rep. 224.

In the case of *Rounds v. Delaware, etc., R. Co.*, 64 N.Y. 129; s. c., 21 Am. Rep. 597, the facts were substantially as follows: The plaintiff jumped upon the platform of a baggage car on the defend-

Carter v. Louisville, New Albany and Chicago Railway Company.

ant's road to ride to a place where the cars were being backed to make up a train. The defendant's rules forbade all persons, except certain employees, riding on baggage cars, and directed baggagemen to rigidly enforce the rule. The plaintiff's evidence tended to show that the baggageman ordered the plaintiff off while the car was in motion. A pile of wood was near the track. The plaintiff replied that he could not get off because of the wood, whereupon the baggageman kicked him off; he fell against the wood and under the cars and was injured. The court held that the baggageman was, while kicking the plaintiff off the platform, acting within the scope of his employment, and that the fact that the plaintiff was a trespasser was no defense. *Hewett v. Swift*, 3 Allen, 420; *Pittsburg, etc., Ry. Co. v. Caldwell*, 74 Penn. St. 421; Cooley Torts, 120; *Shea v. Sixth Av. R. Co.*, 62 N. Y. 180; s. c., 20 Am. Rep. 480; *Lovett v. Salem, etc., R. Co.*, 9 Allen, 557.

It is insisted that the several paragraphs of the complaint are bad, because it is only averred that one of several employees of the appellee, having charge of the engine, pushed the appellant from it, without specifying the duties and employment of this particular one of said employees. After stating the manner in which the appellant got upon the engine, it is averred, in the first paragraph, that the employees of the appellee having charge of the engine put it in motion, that one of said employees ordered the appellant off, etc.; "that said employee shoved him off," etc. If, as thus averred, one of several employees of the appellee, having charge of the engine, put him off of it in the manner stated, the appellee is responsible for his act. In this respect the other paragraphs are like the first, some of them more certain indeed, and the fourth alleges that the appellee threw the appellant from the engine. The complaint, and each paragraph of it, is as certain and specific in this respect as were the complaints in the case of *Evansville, etc., R. Co. v. Baum*, *supra*, and *Pittsburgh, etc., R. Co. v. Theobald*, 51 Ind. 246. If the complaint was not sufficiently specific, a motion to make it more specific would have been proper.

We conclude that the several paragraphs of the complaint are good, and that the demurrer to them should have been overruled.

PER CURIAM. It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the cost of the appellee, with instructions to overrule the demurrer to each paragraph of the complaint.

Carter v. Louisville, New Albany and Chicago Railway Company.

ON PETITION FOR A REHEARING.

PER CURIAM. While a member of the Supreme Court Commission, Mr. Commissioner MORRIS wrote an opinion overruling the petition for a rehearing. That opinion has been held under advisement by the court. The petition for a rehearing is now overruled, and the opinion written by the commissioner is adopted as the opinion of the court. It is as follows:

A petition for a rehearing, accompanied by an earnest and able argument, has been filed in this case. The appellee complains that in the opinion no notice is taken of the fact, that in several of the paragraphs of the complaint, the engine which is alleged to have run upon and injured the appellant is described as a "switching engine." This is true, but as the engine is not described in any of the paragraphs as having been used in connection with a passenger train, it was thought unnecessary to notice such fact.

It is held in the main opinion that the servants of a railroad company, to whom the management and control of an engine have been intrusted, whether used for switching or other purposes, have, while using and controlling it, implied authority to remove from it any trespasser who may get upon it or attempt to occupy and control it. In thus holding, the appellee insists that the court erred. The appellee admits, as we understand its counsel, that those in charge of its passenger engines and trains have implied authority, as its servants, to remove and put off persons wrongfully upon such engines and trains; but it denies that its servants, to whom it has given the management and control of a "switching engine," have implied authority to remove from it persons wrongfully upon it while so being used by its servants in the transaction of its business. If such servants have no such implied authority, a rehearing should be granted; if they have such authority the petition should be overruled.

It is said by the appellee, that switching engines are used for local purposes — to place and replace cars, etc. — and not for the purpose of receiving and discharging passengers; that therefore its employees have no implied authority to remove from an engine committed to their care for such purposes, persons wrongfully upon it, whether their presence may or may not interfere with the use of the engine and the business to be transacted. Several cases are cited in support of this view. The first case to which the appellee

Carter v. Louisville, New Albany and Chicago Railway Company.

calls our attention is that of *Towanda Coal Co. v. Heeman*, 86 Penn. St. 418. In this case a minor had climbed upon one of the defendant's coal cars when in motion. A brakeman drove him off by throwing coal at him. He was hit in the face by a piece of coal which caused him to fall, whereby he was injured. It was held that the defendant was not liable. The proof showed clearly that the brakeman was not in charge of the coal train; that though a coal train (the appearance of which showed that it was not used for transporting passengers), its conductor, as its general manager, had authority to remove trespassers from it. This was conceded by the defendant's counsel, and the reasoning and whole drift of the case show that had the conductor violently removed the boy, a different result would have been reached.

The next case cited by the appellee is that of *Marion v. Chicago, etc., R. Co.*, 59 Iowa, 428; s. c., 44 Am. Rep. 687, in which it was held that the defendant was not liable for the act of a brakeman in putting a trespasser off a freight train in motion, without direction from the conductor, who alone was authorized by the defendant to order such ejection. The court held the defendant not liable because the brakeman had no authority, express or implied, to remove trespassers from the train. But it further held that the conductor, by his general employment as the manager of the train, had such authority, and that had he ejected as did the brakeman, the plaintiff from the train, the defendant would have been liable. And we think it equally clear, that had a tramp got upon the engine, not as a passenger or for the purpose of stealing a ride, but from mere idle curiosity, the conductor or engineer would have had authority to remove him, not because he had charge of passengers, but because he had the general control of the engine and train. The removal of such a trespasser would have about the same relation to the business of transporting passengers that the removal had, in the case before us, to the business of changing the position of cars. If the servant in charge of the freight train would be acting within the scope of his authority in removing from his engine such a trespasser, would not the servant, in charge of a switching engine, also have the implied authority to remove such a trespasser from the engine in his charge? The relation of the servant and the trespasser to the business of the employer would be the same in both cases. The trespasser upon the engine would interfere no more with the transportation of freight or even passengers, than he would with the changing of cars.

Carter v. Louisville, New Albany and Chicago Railway Company.

The next case relied upon by the appellee, which we notice, is that of *Wright v. Wilcox*, 19 Wend. 343; 32 Am. Dec. 507. The defendant's servant was driving a wagon. A boy asked permission to ride. The servant said he might when he got to the top of a hill which he was then ascending. The boy got hold of the side of the wagon between the front and hind wheels. The servant cracked his whip and the horses started into a trot, whereby the boy was thrown under the wheels and injured. The master and servant were sued jointly. It was held by the court that they were not jointly liable. It was also held that the act of the servant was clearly willful, and that therefore the master was not liable. The court, following the rule stated in *McManus v. Crickett*, 1 East, 106, says:

“If Stephen,” the servant, “in whipping the horses, acted with the willful intention to throw the plaintiff's boy off, it was a plain trespass, and nothing but a trespass, for which the master of Stephen is no more liable than if his servant had committed any other assault and battery. All the cases agree that a master is not liable for the willful mischief of his servant, though he be at the time, in other respects, engaged in the service of the former.” Again the court says: “The law holds such willful act a departure from the master's business.” This statement of the law is not correct. If the act of the servant is within the scope of his employment, the master is liable, however willful the act on the part of the servant may have been. In speaking of this and the class of cases to which it belongs, Thompson in his work on Negligence, 886-7, says: “If he,” the servant, “makes use of his master's property in committing this wrong, he will be deemed, according to the fantastic reasoning of Lord KENYON” in *McManus v. Crickett*, *supra*, “to have acquired, for the time being, a special property therein. The fallacy of this reasoning was, that it made a certain mental condition of the servant the test by which to determine whether he was acting about his master's business or not. Moreover, with respect of all intentional acts done by a servant in the supposed furtherance of his master's business, it clothed the master with immunity if the act was right, because it was right; and if it was wrong, it clothed him with a like immunity because it was wrong.” He further says: “A doctrine so fruitful of mischief could not long stand unshaken in an enlightened system of jurisprudence.” See the cases cited on p. 887, repudiating the doctrine, which the author says is not the law.

Carter v. Louisville, New Albany and Chicago Railway Company.

The case of *Isaacs v. Third Avenue R. Co.*, 47 N. Y. 122; s. c., 7 Am. Rep. 418, relied upon by the appellee, has been substantially overruled. Wood disapproves the case in his work on Master and Servant.

The case of *Shea v. Sixth Avenue R. Co.*, 62 N. Y. 180, is, in its reasoning, opposed to it. In *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, Judge ALLEN, who prepared the opinion in the case, admitted that it had been questioned, that it was a "border case," and that it "may seem to infringe upon some of the other reported cases."

Other cases are referred to by the appellee. We have examined them, and think they are not in conflict with the main opinion in this case.

In the case of *Hoffman v. New York Cent., etc., R. Co.*, 87 N. Y. 25; s. c., 41 Am. Rep. 337, it was held that a brakeman on a passenger train, as well as the conductor, had implied authority to remove from the train a boy who had jumped on the platform of one of the cars for the purpose of stealing a ride, and that the employer would be liable if he improperly removed the boy while the train was in motion. The court says: "Suppose a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defense to an action against him for the assault, that he was a brakeman, and did the act complained off in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience." Equally may the authority of those in charge of a switching engine to remove trespassers from it be inferred from the nature of the business and its actual daily exercise, according to common observation. And so too might one in charge of such an engine, if sued for assault for removing a trespasser from it, answer that he was in charge of it as the servant of the company. The court, in support of its decision, refers to *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 129.

In the case of *Benton v. Chicago, etc., R. Co.*, 55 Iowa, 496, a boy had entered an empty freight car to steal a ride. He was discovered by the conductor and roughly ordered out. The train was in motion. The only way of escape was through a window, and the boy, in attempting to crawl out, lost his hold and fell upon the track and was run over and killed. It was held, upon proof of these facts, that the case should go to the jury. No doubt was expressed as to the

Carter v. Louisville, New Albany and Chicago Railway Company.

authority of the conductor properly to remove the boy. The train was not a passenger train, but a freight train. Presumably, it was to be used simply for the transportation of freight. The conductor's authority to remove trespassers from such a train can be inferred or implied only from the fact that he has control of the train, and from the nature of the business and the means employed in its transaction. The exercise of such power is necessary alike for the protection and security of the employer and the public.

In the case of *Evans v. Davidson*, 53 Md. 245 ; s. c., 36 Am. Rep. 400, a general farm servant, in the absence of his master, undertook, with other servants, to drive a cow of the plaintiff out of his master's cornfield into which she had broken, and in doing so, struck the cow with a stone and killed her in the field. The master was held liable.

In the case of *Cauley v. Pittsburgh, etc., Ry. Co.*, 98 Penn. St. 498, a boy got upon a sand car standing upon a switch. The car was moved a few yards, and while in motion the conductor ordered him off. In obeying the order the boy was injured. Upon the trial the boy offered to prove the above facts. The court ruled the offered evidence out, on the ground that the facts did not tend to prove negligence on the part of the defendant's servants. PAXSON, J., says: "All the conductor did was to order the plaintiff off the car. This was his duty. The boys were trespassers, and their removal from the cars was not in itself a cause of complaint. Was there any thing in the manner of their removal which would render the defendant company liable in damages? The plaintiff was not thrown off. He was not touched by the conductor or any railroad employee. * * * Before the company can be held liable it must appear that the injury to the plaintiff was the natural and probable result of the conductor's order."

The court held that the offered evidence did not tend to prove this, and that therefore there was no error in its exclusion. But the court also held that it was the duty of the conductor having control of the sand car to remove the trespassing boys from it. The conductor's authority was not inferred from the fact that it was his duty to receive and discharge passengers on and from the sand car, for its form and construction, as well as its use, was notice to him and all others, that it was not intended and could not, any more than a switching engine, properly be used for any such purpose. It was his duty to remove trespassers from the sand car, because its

Carter v. Louisville, New Albany and Chicago Railway Company.

management and control had been intrusted to him, and because such a use of the sand car by trespassers would be incompatible with the use which the conductor was, by his employment, required to make of it in the transaction of his employer's business. The court assumed, that had the conductor improperly removed the plaintiff from the sand car, the defendant would have been liable. This case is, we think, directly in point. Had the appellant wrongfully intruded himself into and occupied the engineer's cab, to the exclusion of the latter, could not those in charge of the engine have removed him, using no unnecessary force. Would not the possession and control of the engine, and their duty to use it in placing and replacing cars, have clothed them by implication with authority to remove such a trespasser? Would it not, as in the case just cited, have been their duty to do so? If the position of the appellee is the law, those in charge of the engine would have no power to remove the trespasser, because the engine was not to be used in hauling passengers, instead of placing and replacing cars.

As against those to whom the possession of the engine had been given for a special purpose, and the exclusive possession and control of which were essential to accomplish that purpose, the trespasser must be regarded as the rightful occupant of the engine, though his possession, by preventing the use of it in placing and replacing cars, might ruinously delay the transportation of freight, endanger the safety of property and passengers, and expose the employer to incalculable losses. We think the appellee, by placing its servants in possession of a switching engine for the purpose of placing and replacing cars upon its track at Lafayette, impliedly gave them authority not only to retain the exclusive possession of the engine while so engaged, but to remove from it all trespassers and wrong-doers.

In the case of *Johnson v. Chicago, etc., R. Co.*, 58 Iowa, 348, it was held that those in charge of the appellant's station-house had implied authority to remove from the waiting room a person who was not there for the purpose of taking passage on the appellant's road, and that if unnecessary force and violence were used in his removal, the appellant would be liable. It was, says the court, nothing more than the application of the ancient rule, that if one person came into the dwelling-house of another without right, after requesting him to depart, and his refusal to comply, he may be removed by gently laying hands upon him and using such force as is

City of South Bend v. Hardy.

reasonably necessary to effect the object. Because the employer might, if present, remove from its engine a trespasser, or from its station-house an intruder, so may the servant to whom the possession, care and use of the station-house or switching engine have been intrusted, remove from the one or the other trespassers and wrong-doers. It is the right of possession in the master, and the duty of the servant to whom the property has been intrusted, to keep and maintain that possession for the master, which give the latter the right to remove trespassers. See also the case of *Nashville, etc., R. Co. v. Erwin*, 3 Am. & Eng. R. Cases 465.

CITY OF SOUTH BEND v. HARDY.

(98 Ind. 577.)

Witness — cross-examination — inculcation.

Where a plaintiff has testified in his own behalf in a suit for personal injury by a defective sidewalk, it is discretionary to allow him to be asked on cross-examination whether he had not combined with others several years before to defraud an insurance company, he not claiming his privilege.

ACTION for personal injury by negligence. The opinion states the point.

J. Haggerty and L. Hubbard, for appellant.

W. G. George and A. Anderson, for appellee.

BLACK, C. The appellant was sued by the appellee to recover damages for his personal injury, caused through the negligence of the appellant, by a defect in a sidewalk over which the appellee was passing at night. There was an answer of general denial.

Two questions embraced in a motion for a new trial made by the appellant, the overruling of which is assigned as error, are presented by counsel for our consideration. The first relates to the exclusion of certain evidence; the second, to the giving of the eleventh instruction to the jury.

City of South Bend v. Hardy.

The plaintiff testified as a witness in his own behalf. On cross-examination he testified that he was absent from South Bend a short time; that he was in Michigan and Wisconsin; in Wisconsin most of the time, in Michigan four days; that he was in Cadillac Michigan; that he did not conspire with others to defraud a life insurance company during his absence; that he did have life insurance before he went to Michigan.

Counsel for the appellant then asked the witness, "What amount of life insurance did you have at the time you were absent from the State?" Upon objection being made by the appellee to this question, counsel for the appellant stated to the court, "that the defendant proposed and offered to prove, by such cross-examination, circumstances tending to show that said plaintiff had had a large amount of insurance on his life; that he secretly left the State and concealed himself; that during his absence his friends attempted to collect his life insurance, alleging that he was dead; and facts tending to show plaintiff's knowledge of such concerted attempt to defraud the life insurance company."

The court sustained the objection and refused to require the witness to answer the question.

Counsel for the appellant then asked the witness, "Do you not know that during your absence it was alleged by your acquaintances that you were drowned at Cadillac, Michigan?" To which the witness answered, "Yes." Counsel for appellant then asked the witness, "Did you not have your life insured before you left South Bend for Michigan and Wisconsin?" Counsel for the appellee objected to the question. Counsel for the appellant then stated: "We expect to show that the plaintiff had insured his life for \$5,000 before going away; that he concealed his whereabouts; that with his knowledge, and to defraud the life insurance company, it was reported by his friends that he had been drowned at Cadillac, Michigan; that he went to Wisconsin to conceal himself to assist in the attempted fraud." The court ruled that the question should not be put or answered.

The date of the trial was January 9, 1883. There was evidence showing that the appellee's absence from South Bend, when he visited Michigan and Wisconsin, was an absence for about three weeks in June or July, 1880 or 1881.

The particular facts which it was sought by these questions to elicit, and the professed purpose of the cross-examination, were

collateral and irrelevant to the principal matter in dispute. Whatever the answers of the witness might have been, they would not have helped to prove or disprove the alleged cause of action. The evidence sought might have tended to impair the credibility of the witness, and to do this was the purpose of the questioner.

In weighing the testimony of a witness, the jury may consider his interest, but we see no reason why a party should otherwise stand upon a different footing from other witnesses as to the modes of attacking his credibility.

The limits of cross-examination, for the purpose of impeaching the credit of witnesses, have not been in all respects clearly defined and uniformly established. Much contrariety is attributable to the great latitude allowable in this regard, in some instances, in the exercise of discretion by the trial court. A witness cannot, on cross-examination, be interrogated as to a particular fact which is collateral and irrelevant, merely for the purpose of contradicting him by other evidence, and of thereby discrediting his testimony. If such a question is put to a witness and answered, his answer is conclusive, and he cannot be contradicted. 1 Greenl. Ev., §§ 448, 449.

In *Bersch v. State*, 13 Ind. 434, on the trial of an indictment against Bersch for passing counterfeit money, the principal witness for the prosecution was one Deckhard. On cross-examination, the defendant proposed to ask this witness if he had not passed a counterfeit bill as a genuine one in Louisville, and that he had sworn about it on a former occasion. The trial court held the question inadmissible. On appeal, this court said that if the defendant's object was to lay the foundation for the contradiction of the witness, such contradiction would be a violation of the rule that it must be as to matter relevant to the issue, and that if the defendant relied upon the answer to impeach the character of the witness, he was attempting to violate the rule, that evidence for that purpose should not go to particular acts, but to general character. But it was said that perhaps the court might, in its discretion, have let the question go to the witness under proper advice, and that there was no error in the ruling.

In an action by a father for the seduction of his daughter, her character for chastity is involved in the question of damages, and proof of her particular acts of sexual immorality has been held admissible.

City of South Bend v. Hardy.

It has been held by this court that in such a case the principal female witness could not, over objections made by counsel, be asked, on cross-examination, whether she had not previously been criminal with other men. It was said that in her character as a witness she stands as any other witness in the case (*Shattuck v. Myers*, 13 Ind. 46), and that in that character she may be impeached only "in the usual mode, through general questions." *Long v. Morrison*, 14 Ind. 595.

In *Wilson v. State*, 16 Ind. 392, which was a prosecution for rape, in speaking of a proposal of the defendant to prove that the prosecutrix was a keeper of a house of prostitution, and that she had with knowledge received a portion of the price of illicit intercourse of a certain man with another woman kept in said house, the proposition being to make the proof by the evidence of another witness, it was said that the evidence could only be offered to show that there was not the utmost reluctance and resistance, and that "the evidence of a particular act of immorality is not admissible to impeach a witness, or affect his general character," and *Shattuck v. Myers, supra*, and *Long v. Morrison, supra*, were cited.

In *Shattuck v. Myers, supra*, the question by which it was sought to elicit evidence of particular immoral acts was asked on cross-examination of the principal female witness in an action for seduction, and the evidence sought related to previous acts of criminal sexual intercourse of the witness with other men than the defendant. In *Long v. Morrison, supra*, it was not stated how the attempt to prove the particular immoral act of the witness was made, though it would seem, from the language used, to have been made by questioning another witness, and the nature of the particular act of immorality is not stated.

In *Smith v. Yaryan*, 69 Ind. 445; s. c., 35 Am. Rep. 232, an action by a female for her own seduction, it was held that as in a bastardy case it is competent to ask the prosecuting witness, on cross-examination, whether she had had sexual intercourse with any person other than the defendant about the time the child was begotten, so where a child was born as the result of the seduction, as this fact would be a proper element to be considered in assessing the damages for the seduction, the question whether the defendant was the father of the child could be tested in the same manner, by cross-examination of the plaintiff, over the objection of her counsel.

City of South Bend v. Hardy.

It seems that it would be sufficient reason for sustaining an objection to such a question as was proposed in *Shattuck v. Myers, supra*, if it were irrelevant to the issue, that though the answer thereto might disgrace the witness in another respect, it would not affect the credibility of the witness. 1 Greenl. Ev., § 458. The relations between the sexes, it is sometimes said, have no direct bearing on the probability of the witness telling the truth. Whart Ev., § 542, n. 2.

When the character for chastity of a female is involved in the issue, as in an action for seduction, it appears to us, that under settled principles of evidence, she may be required to testify, on cross-examination, to any particular acts showing her previous want of chastity, if they would not tend to criminate her, but would only disgrace her. Where male witnesses may be required to disgrace themselves by testifying in such cases to their acts of sexual intercourse, not the subject of the action, with the female seduced, no reason can be seen why she should be exempted. No distinction, on principle, can be seen between the case of such a witness, in an action for seduction, and that of the prosecutrix in an indictment for rape, character for chastity being involved in the former action in the question of damages, and in the latter action in the question of the probability of assent. It has sometimes been held in both these cases that it was not proper to put such questions to the principal female witness, and the contrary has been held in both cases. In *Shattuck v. Myers, supra*, a New York case was referred to, in which it was held proper to ask such questions of the prosecutrix on the trial of an indictment for rape, and it was attempted in *Shattuck v. Myers, supra*, to distinguish such a case from an action for seduction.

Such cross-examination of the principal female witness in either of such cases would go to the matter in issue, and if she denied the immoral act, she might be contradicted by other witnesses; and it is not proper to treat such cross-examination solely as an attempt to impeach the witness.

“In modern times, it has frequently been held, that in actions for seduction, and on indictments for rape, the principal female witness might be cross-examined, with the view of showing that she had previously been guilty of incontinence with the defendant, or even with other men, or with some particular person named; and when she has denied the facts imputed, witnesses have been called for the purposes of contradiction.” 2 Greenl. Ev., § 577, n. a.

City of South Bend v. Hardy.

Of course, if any question put to a witness would elicit an answer which would tend, by reason of any statute, to expose him to a criminal prosecution, the witness may decline to answer. *French v. Venneman*, 14 Ind. 282.

Any inference that might be drawn from *Bersch v. State, supra*; *Shattuck v. Myers, supra*; *Long v. Morrison, supra*, and *Wilson v. State, supra*, that the credibility of a witness can never be attacked by evidence of particular acts of immorality elicited by cross-examination of such witness, would not be strictly correct.

If the answer to a question propounded to a witness would furnish a link in the chain of evidence which would convict him of a crime, and if he claim his privilege, he is not bound to answer, whether his answer would be material and relevant, or collateral and irrelevant, to the issue. But where the answer would thus tend to expose the witness to a criminal charge, if it be material and relevant to the issue, the privilege belongs to the witness alone, and must be claimed by him; the objection cannot be interposed by a party, but the witness, advised of his privilege, will be permitted to answer if he choose to do so.

If the answer would tend merely to degrade the character of the witness, and if it be relevant and material to the issue, whether it would go to his credibility or not, he may not decline to answer, and a party cannot object.

If however the answer to a question on cross-examination would be collateral and irrelevant, and would merely disgrace the witness, but would not affect his credibility, the witness may decline to answer; the court should in all cases sustain an objection made by counsel, and the court may, without objection made, interpose and protect the witness from the impertinence. 1 Greenl. Ev., § 458.

If the cross-examination tends merely to disgrace the witness, but relates to a collateral and independent fact, and goes clearly to the credit of the witness, whether in such case he has the privilege to decline or not, the matter so far rests in the discretion of the trial court that in the absence of a claim of privilege, if the question relate to a matter of recent date and would materially assist the jury or the court in forming an opinion as to his credibility, the court will usually require an answer, over the objection of counsel, but may sustain an objection.

When the answer would tend to criminate the witness, but would be collateral and irrelevant to the issue, and yet would affect his

credibility, if he do not claim his privilege, no distinction, so far as the discretion of the court and the right of a party to call for its exercise by an objection are concerned, can be perceived between such a case and one differing from it only in that the answer would merely disgrace the witness. In short, where the question relates to a particular act which is collateral and irrelevant to the issue, it is proper for a party to object, and it is within the sound discretion of the court, where the witness does not exercise a privilege to decline, to permit an answer, if by affecting the credibility of the witness it will subserve justice, or to sustain the objection, if such purpose will not be promoted by the answer; and if the answer would not affect the credibility of the witness, the court should sustain the objection, and has no discretion to admit the evidence. See *Great W. Turnpike Co. v. Loomis*, 32 N. Y. 127; *Shepard v. Parker*, 36 id. 517.

Section 2138, R. S. 1881, provides: "Whoever presents or causes to be presented any false and fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss by fire or death; or who shall prepare, make, or subscribe any account, certificate, survey, affidavit, proof of loss, or other book, paper, or writing, with intent to present or use the same, or allow it to be presented or used, in support of any such claim, — shall, upon conviction thereof, be imprisoned in the State prison," etc. And the next section provides: "Any person or persons who shall unite or combine with any other person or persons, for the purpose of committing a felony; or any person or persons who shall knowingly unite with any other person or persons, or body or association or combination of persons, whose object is the commission of a felony or felonies, — shall, upon conviction thereof, be fined in any sum not more than five thousand dollars nor less than twenty-five dollars, and imprisoned in the State prison," etc.

The evidence, which it was the professed purpose of the cross-examination to elicit, not only might have disgraced the witness, but also might have constituted a link or links in a chain of evidence which would have fixed upon him a criminal charge. The witness might have declined on the ground of privilege. The evidence was collateral and irrelevant to the issue. In the absence of a claim of privilege, though the answer sought would have affected the credit of the witness, it was within the discretion of the trial court to sustain the objection of counsel; and if the exercise of such

City of South Bend v. Hardy.

discretion be, in any case, subject to review upon appeal, we are satisfied that there was no abuse of discretion in this case.

[Minor matters omitted.]

The judgment should be affirmed.

PER CURIAM — It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellant.

Judgment affirmed.

IN WITNESS WHEREOF, we have hereunto set our hand and seal of office, at the City of South Bend, this 10th day of November, 1884.

10

JAMES M. HARRIS

RECORDED & INDEXED

NOV 10 1884

CLERK OF COURT

SOUTH BEND, IND.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

JORDAN V. ALABAMA GREAT SOUTHERN RAILROAD COMPANY.

(74 Ala. 85.)

Corporation — malicious prosecution.

An action for malicious prosecution may lie against a corporation.

MALICIOUS prosecution. The opinion states the case. The defendant had judgment below.

D. T. Castleberry, for appelleant.

Rice & Wiley, Inzer & Green, and J. J. Garrett, contra.

BRICKELL, C. J. The judgment of the Circuit Court, sustaining the demurrers to the complaint, was doubtless in obedience to the decision in *Owsley v. M. and W. P. R. Co.*, 37 Ala. 560, that while an action of trespass for false imprisonment may be maintained against a corporation aggregate, an action on the case for a malicious prosecution cannot be supported. The distinction between the two actions, which embodies the reason of the decision, then supposed to rest on the weight of authority, is thus stated: “The

Jordan v. Alabama Great Southern Railroad Company.

distinction seems to be between acts injurious in their effects, and for which the actor is liable without regard to the motive which prompted them, and conduct the character of which depends upon the motive, and which, apart from such motive, cannot be made the ground of legal responsibility." There are not wanting authorities taking the like distinction, affirming that as a corporation "is an artificial being, invisible, intangible, and existing only in the contemplation of law," to which the law cannot impart *animus*, passion, or moral quality; which is incapable of the commission of an offense, deriving criminality from an evil intent, or consisting in a violation of social duty, it cannot be subjected to a civil action of which an essential, distinguishing element is malice, or a mischievous purpose or motive. The current of authority now is, that corporations are responsible, civilly, the same as natural persons, for wrongs committed by their officers, servants or agents, while in the course of their employment, or which are authorized, or subsequently ratified. Ang. & Ames Corp., §§ 385-89; Morawetz Priv. Corp., §§ 89-96; Cooley Torts, 119-23; *S. and N. R. Co. v. Chappell*, 61 Ala. 527.

The immunity from individual liability afforded by corporate organization; the capacity for the concentration and employment of intelligence, energy and capital, without break or interruption because of changes in membership, has led to the multiplication of corporations, until there is scarcely an object of general concern a corporation is not formed to promote, and to a great extent they have engrossed business in all hazardous enterprises, or enterprises requiring the investment and use of large capital. "With the multiplication of corporations," said ROGERS, J., in *Bushell v. Com. Ins. Co.*, 15 S. & R. 176, "which has and is taking place to an almost indefinite extent, there has been a corresponding change in the law in relation to them;" and he adds: "The change in the law has arisen from a change of circumstances—from that silent legislation by the people themselves, which is continually going on in a country such as ours, the more wholesome because it is gradual and wisely adapted to the peculiar situation, wants and habits of our citizens." And in *P. W. and B. R. Co. v. Quigley*, 21 How. 210, Mr. Justice CAMPBELL said: "With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body

and their agents, with the natural persons with whom they are brought into contact or collision." It is the aim and duty of courts to apply principles of the common law, with such modifications as are necessary to adapt them to the changed necessities, varied social conditions and diversified business and interests of the community. Perhaps there is not, in the history of the common law, more distinctive evidence of its modifications, of the rejection of its narrow technicalities, than in the adaptation of the legal relation of corporations to a just liability for the acts, omissions, or engagements of the governing body, or its agent, or servants, employed in the transaction of corporate business. The ancient rule, that they could speak and act only through the common seal, is obsolete; and now they are bound by the like implications and inferences which bind natural persons. The technicality, that an action of trespass would not lie against a corporation aggregate, because the process proper in such action — a *capias* and *exigent* — could not issue, has almost disappeared from the books. Referring again to the case of *P. W. and B. R. Co. v. Quigley*, *supra*, we quote the words of Mr. Justice CAMPBELL: "To enable impersonal beings — mere legal entities, which exist only in contemplation of law — to perform corporal acts, or deal with personal agents, the principle of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body, selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are connected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary co-relative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives.

* * * The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." This is admitted to be the result of the authorities in *Owsley v. M. and W. P. R. Co.*, *supra*, subject to the limitation that as the corporation is incapable of malice, it is not liable for torts of which malice is an essential element.

The idea that a corporation is not liable for a tort involving a

Jordan v. Alabama Great Southern Railroad Company.

malicious intent had origin in the day when it was denounced as soulless, and was an application of the quaint syllogism ascribed by Lord COKE to Chief Baron MANWOOD, that "None can create souls but God; but a corporation is created by the king; therefore a corporation can have no soul," from which was deduced the conclusion that it could do no wrong. There was a reluctance to look beyond legal entity, to the natural persons, its constituent members, or to the agents or servants through whom its faculties were exercised and its legal existence kept alive. To the mere legal entity, motive, good or evil cannot be imputed, but is imputable to its representatives; and as the corporation derives benefit from the representation, there is but little of justice in a claim of exemption from the responsibilities it may involve.

We have among us not only purely domestic corporations but corporations existing by the separate authority of several States, drawn into the daily transaction of business with all classes of the community, holding property of every species under the protection of the law of the State, compelled to a frequent resort to the courts for prevention or redress of injuries. Foreign corporations, by a liberal comity, here exercise corporate power, transact business, hold and enjoy property. It is by the representation of natural persons that their franchises are exercised, their business transacted and property acquired. It would not be just if a natural person suffer wrong from the malicious acts of the representative of a corporation, while within the scope of his employment, for the courts to refuse to look beyond the legal entity to its real and true character, an association or aggregation of natural persons capable of acting by a corporate name and in continuous succession. This is not unjust to the corporation, for it "tends to induce greater care and caution in the selection of those who are to be intrusted with corporate affairs." The same reasons that render a corporation responsible for any tort committed by its agents, if we do not resort to the technicality that it is incapable of motive, will render it liable for a malicious prosecution. *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Carter v. Howe Machine Co.*, 51 Md. 290; s. c., 34 Am. Rep. 311; *Wheless v. Second National Bank*, 1 Baxt. 469; s. c., 25 Am. Rep. 783; *Jefferson R. Co. v. Rogers*, 29 Ind. 7; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Vance v. Erie R. Co.*, 32 N. J. L. 334; *Williams v. Planters' Insurance Co.*,

Tabor v. Peters.

57 Miss. 759; s. c., 84 Am. Rep. 494; *P., W. and B. R. Co. v. Quigley*, 21 How. 202. We feel constrained upon this point to depart from the decision first referred to in *Owsley v. M. and W. P. R. Co.*, 37 Ala. 560. This conclusion is decisive of the case, as now presented; and we purposely abstain from any discussion of the facts and circumstances which must concur to fix upon a corporation liability for tortious acts of its servants or agents.

The Circuit Court erred in sustaining the demurrers to the complaint upon the specific ground that an action on the case for malicious prosecution will not lie against a corporation.

Reversed and remanded

TABOR V. PETERS.

(74 Ala. 90.)

Sale — warranty — patent defects.

On the sale of a patent right to a churn, manufactured by the seller, he exhibited a sample of it, stating that it would produce butter in from three to five minutes; could be operated by a child five or six years old; that it was made of juniper wood, and that the dasher was nickel-plated; whereas in fact it would not produce butter in less than ten minutes, was too heavy for children to work it, was made of white pine and painted, and the dasher was of polished iron. *Held*, a valid warranty, and that the court could not pronounce the discrepancies so plain and obvious as to avoid it.

ACTION on notes. The opinion states the case. The defendant had judgment below.

D. T. Castleberry, for appellant.

Bowdon & Knox, contra.

SOMERVILLE, J. The suit is on certain promissory notes, given by defendants to plaintiff for an interest in a patent right to what was alleged to be an improved churn, the territory included in the purchase being confined to the county of St. Clair, in this State. The defense set up is based on certain statements made by the plaintiff, as inducements to the purchase, relating to the qualities and capacities of the patented article, which are alleged to have

Tabor v. Peters.

been false, and fraudulently made; and want of consideration and failure of consideration are also pleaded.

It is shown that the plaintiff, Tabor, was himself engaged in the manufacture of these churns, and at the time of the negotiation he made this fact known to the defendants, and exhibited to them a sample or specimen of his patented invention. The representations alleged to have been made by him at the time are, that the churn would produce butter in from three to five minutes; that it was made of juniper wood; that the plunger-rod was nickel-plated, and would not corrode or discolor the milk and butter; and that a child, five or six years old, could operate it with ease. The evidence tended to show that these statements were untrue — that it would not produce butter in less than ten minutes; that the body of the churn was made of white pine, and the top of poplar wood; that it was too heavy for use by women or children, requiring the strength of a man to operate it; and that the rod was not nickel-plated, but was made of polished iron, and would corrode or discolor the milk and butter, to such extent as to render the invention entirely worthless. The sample churn exhibited by plaintiff was painted on the outside, and was inspected by one of the defendants.

[Omitting minor questions.]

The settled rule as to the nature of the representations which will avoid a contract of sale is well stated in the case of *Sledge v. Scott*, 56 Ala. 202. The rule as there announced is, that “a misrepresentation by a vendor of chattels, of a material fact, made at the time of, or pending the negotiation for the sale, on which the purchaser has the right to rely, and in fact relies, is a fraud, furnishing a cause of action to the purchaser, or a ground of defense to an action for the purchase-money.” Benj. Sales (3d ed.), § 454; Story Sales, § 165.

No particular words are essential to constitute a warranty. As a general rule, there must be the affirmation of some fact, as distinguished from the mere expression of an opinion. Words of praise or commendation by a vendor, such as are ordinarily used by honest tradesmen, as arts of persuasion to induce purchase, are deemed insufficient. They fall within the maxim, *simplex commendatio non obligat*, and however extravagant, they do not in law impose a liability, either in the nature of contract or of tort. *Farrow v. Andrews*, 69 Ala. 96; 1 Pars. Cont. *579-581; 2 Brick. Dig., p. 408, §§ 75-78. A false statement, however, when deliberately made,

although in the shape of an opinion, as to the quality, quantity or condition of the article sold, may often be construed to be a warranty, if it be so intended and understood by the parties. 1 Whart. Cont., § 259; *Barnett v. Stanton*, 2 Ala. 181. In *Wilcox v. Henderson*, 64 Ala. 535, it was said that "to constitute expressed opinion a ground, or instrument of fraud, it must be knowingly false, made with intent to deceive, and must be accepted and relied on as true." In determining the question of intention, which is generally one for the jury, at least in cases of doubt, a decisive test is, as suggested by Mr. Benjamin, "whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment, upon a matter of which the vendor has no special knowledge and on which the buyer may be expected also to have an opinion, and to exercise a judgment. In the former case there is a warranty, in the latter not." Benj. Sales (3d ed.), § 613; *Kenner v. Harding*, 85 Ill. 264; s. c., 28 Am. Rep. 615. And "what would be matter of opinion," says Mr. Wharton, "when spoken by a non-specialist, may be a matter of fact when spoken by a specialist." 1 Whart. Cont., §§ 259-260.

There are many adjudged cases illustrating these principles in their application to the sale of patented rights and inventions. It has been said generally, that statements made by vendors, as to the utility of such patents, are considered matters of opinion, while those having reference to their practical capacity and characteristics are deemed matters of fact. 1 Whart. Cont., § 259. A proposition which cannot be taken to be universally accurate, many cases being dependent upon their own peculiar surroundings. It has been held in an English case that a statement to a farmer by a vendor, who was the patentee's agent for the sale of an agricultural machine, known as "Wood's Patent Reaper," that it would "cut wheat, barley, etc., efficiently," was not a warranty but a recommendation. *Chalmers v. Harding*, 17 L. T. (N. S.) 571. In *Elkins v. Kenyon*, 34 Wis. 93, the assertion by the vendor of a patented machine for elevating hay, that it would work "in all kinds of hay, grain, straw and other grass," and was "in all respects fit for the use intended," was decided to be a warranty. In *Nelson v. Wood*, 62 Ala. 175, where the subject of sale was the right to use a patented process for tanning leather, representations made by the vendor as to the time it would take, and the quality of the leather produced, were held

Tabor v. Peters.

sufficient to vitiate the contract of sale on proof being made that they were false, and that the process was of no value.

The case of *Bigler v. Thickingner*, 55 Penn. St. 279, was strikingly similar to the one in hand, being a suit on a note given for a patent right for a churn. The representation made was that it would make butter in from seven to ten minutes. One of the defenses set up being misrepresentation and fraud, the court said: "The representation of what the churn would do proved utterly false; and although this was not a warranty in itself, yet it was for the jury to say, under all the circumstances, whether it was not a false representation knowingly and fraudulently made. The parties were not in a position of perfect equality to judge of the article, and hence the representation of the seller, if falsely made, would avoid the contract. The jury found the falsity of the representations, and the worthlessness of the article, and this established a good defense.

In *Rose v. Harley*, 39 Ind. 77, a false assertion made by the vendor of a patent as to what improvements were covered by it, was held to vitiate the sale of an interest in the patent right. So in *Allen v. Hart*, 72 Ill. 104, false assertions as to the value of the territory covered by the patent, to be included in the purchase, based upon the statement of matters of fact within the knowledge of the vendor and not of the purchaser, were decided to be a good ground of action to recover back the consideration paid for an interest in the patent right.

The charges given by the court below, in reference to the representations made by the plaintiff Tabor, were correct, being in full accord with the principles above stated.

It is further contended however that the defendant cannot set up fraud as a defense to this action, based on the falsity of these representations, because he inspected the specimen or sample churn exhibited to him by plaintiff, and it corresponded with those manufactured by the vendor, and subsequently ordered by the defendant for sale in his purchased territory.

The rule is generally stated to be that neither a general nor an implied warranty will cover defects, which being external and visible, are "plain and obvious to the purchaser" upon mere inspection with the eye. *Livingston v. Arrington*, 28 Ala. 424; *Benj. Sales* (3d ed.), § 617; 1 *Whart. Cont.*, § 225. It is said by Mr. Parsons that "if there be an express warranty, an examination of

samples is no waiver of the warranty; nor is any inquiry or examination into the character or quality of the things sold; for a man has a right to protect himself by such inquiry, and also by a warranty." 1 Par. Cont. (6th ed.) *586. Mr. Wharton observes that warranties may be found to extend to patent defects, unless the statement made is "glaringly inconsistent" with the visible condition of things. 1 Whart. Cont., § 245. A warranty that a horse has both eyes, when he is manifestly blind, would not, it is apprehended, impose any liability. 1 Add. Cont., § 628. And as held in an old case, "if one sells purple to another and saith to him, 'this is scarlet,' the warranty is to no purpose." It was said that to "warrant a thing that may be perceived at sight is not good." *Baily v. Merrell*, 3 Bulstr. 95; Benj. Sales (3d ed.), § 617. But as observed by Chancellor Kent, "if the vendor says or does any thing whatever with an intention to divert the eye or obscure the observation of the buyer, even in relation to open defects, he would be guilty of an act of fraud." 2 Kent. Com. *484-85.

It does not appear that the defects in the patented churn shown to the defendant by plaintiff at the time of their negotiation were of this obvious character. The churn was painted on the outside, thus concealing the nature of the material of which it was constructed; and we cannot say, without proof, that the appearance of white pine and juniper wood is so different as to be glaringly obvious to the eye when inspected under such circumstances. The same is true as to the handle or rod, and the representations which were made touching it.

The parties to the sale moreover were not in a condition of relative equality touching their knowledge or ability to judge accurately of the thing sold. The plaintiff was a specialist or expert, being a manufacturer of such articles; and was therefore possessed of a knowledge of facts in reference to their nature, capacity and structure, of which the defendant was both actually and professedly ignorant. In such cases the misrepresentations of the seller will the more readily avoid the contract, and many statements when made by him will be deemed affirmations in the nature of fact, although they might be construed conjectural, or matters of opinion, had they emanated from one not enjoying such opportunities of information. Such is the rule at least when such assertions are shown to have been falsely made, and were material inducements to the contract. *Bigler v. Flickinger*, 55 Penn. St. 279-283; 1 Par. Cont. *580; 1 Whart. Cont., §§ 259-60.

Wolffe v. Eberlein.

The evidence is clear that a part of the inducement to the purchase by defendants of the patent right in question was the ability and readiness of the plaintiff to furnish the defendants with a supply of the patented articles. The purchase was entirely useless without it. The plaintiff being himself the manufacturer, and having contracted to supply the articles manufactured by him for a special purpose, he must be held by implication to have stipulated that they were useful, and reasonably suitable for the purpose for which they were furnished. If they proved to be worthless, this would be considered a failure of consideration in the contract, resulting from a breach of the implied warranty. The purchaser in such cases has a right to rely upon the judgment and skill of the manufacturer. *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Benj. Sales* (3d ed. Bennett), §§ 657, 661; *Snow v. Schomacker Manufacturing Co.*, 69 Ala. 111; *Hight v. Bacon*, 126 Mass. 10; s. c., 30 Am. Rep. 639.

The rulings of the court are in strict conformity to the foregoing principles, and its judgment is affirmed.

Judgment affirmed.

WOLFFE V. EBERLEIN.

(74 Ala. 99.)

Bankruptcy — new promise — action.

When a subsequent promise is made to pay a debt discharged in bankruptcy, the creditor may sue on the new promise, or he may sue on the original debt and reply the new promise to a plea of discharge.

ACTION on a judgment. The opinion states the case. The plaintiff had judgment below.

Rice & Wiley and D. Clopton, for appellant.

Watts & Sons, contra.

SOMERVILLE, J. The proposition is not denied, that where a debt has been discharged by a decree in a court of bankruptcy, it

may, in a certain sense, be revived, so as to renew its legal obligation, by an express and unequivocal promise to pay it, made by the debtor subsequent to the date of discharge. The authorities are in perfect harmony as to this principle, the only conflict of opinion being as to cases where the debtor makes a promise to pay prior to obtaining his certificate of discharge. *Evans v. Carey*, 29 Ala. 99; Bish. Cont., § 448; *Allen v. Ferguson*, 18 Ala. 1; *Knap v. Hoyt*, 57 Iowa, 591; s. c., 42 Am. Rep. 59; *Nelson v. Stewart*, 54 Ala. 115; s. c., 25 Am. Rep. 660. This case is clearly of the former class, the promise to pay being express, and subsequent to the discharge in bankruptcy.

The present action was brought on a judgment, in defense of which the appellant, in the court below, set up by way of plea his discharge in bankruptcy. The plaintiff made replication of an express promise by defendant to pay the claim unconditionally. The main point of contention is on the form of the pleadings. It is insisted that the replication of a verbal promise is a departure from the original cause of action, which declared on a judgment, and that the action should have been based upon the new promise, and not upon the judgment, which was extinguished by the fact of defendant's discharge in bankruptcy.

There are two views of this subject presented in the books, as to the effect of a new promise to pay in its relation to a plea of bankruptcy. The more logical and sounder view perhaps is, that the new promise, and not the old debt, is the meritorious cause, or real foundation of the action. The old debt has become extinguished by operation of law, and no longer exists. But the moral obligation to pay still exists, and this, coupled with the antecedent valuable consideration, is sufficient to support a new promise, if clear, distinct and unequivocal in its nature. The moral obligation, uniting to the new promise, makes what was designated by Lord MANSFIELD, in *Truman v. Fenton*, Cowp. 544, "a new undertaking and agreement." *DePuy v. Swart*, 3 Wend. 135; 20 Am. Dec. 673; *Farley v. Kelly*, 88 N. C. 227; s. c., 43 Am. Rep. 743.

There is another class of cases, supported perhaps by the weight of authority, which refer the efficacy of such promises exclusively to the principle, that the defendant may renounce the benefit of a law designed for his protection, and that the effect of a new promise is to waive any discharge that may be obtained in bankruptcy, at

Wolffe v. Eberlein.

least to an extent commensurate with the promise itself. Mr. Wharton, in his recent work on Contracts, after observing that the validity of promises of this class is no longer placed upon the consideration of moral obligation, asserts that "the liability is now based exclusively on the right of a party to waive the protection of a statute relieving him from indebtedness." 1 Whart. Cont., § 513. Mr. Addison suggests, that "the express promise operates to revive the liability and take away the exemption." 1 Add. Cont. (Am. ed.), § 13. The same view is adopted by Mr. Parsons and Mr. Bishop in their works on Contracts, and in fact, with singular unanimity by most if not all of the text-writers. 1 Pars. Cont. 434-435*; Bish. Cont., §§ 446-448; Leake Cont. 317; 1 Story Cont., § 466. The past decisions of this court seem to have proceeded upon this theory of the law, and the prevailing system of pleading, by which the plaintiff is accustomed to declare upon the original promise, and to introduce the new promise by way of replication to the plea of bankruptcy, is manifestly an outgrowth of it. *Dearing v. Moffitt*, 6 Ala. 776; *Branch Bank v. Boykin*, 9 id. 320; *Evans v. Carey*, 29 id. 99, 107.

It is not required that we should decide which of these two theories is correct. The better view, in our judgment, is that suggested by Mr. Parsons, that the plaintiff may, at his election, bring suit either upon the new promise, and declare upon it, in the first instance, as the foundation of his action, thus himself assuming the *onus* of proving the discharge in bankruptcy, without which the new promise would be unavailing; or he may sue upon the old or original promise, and when the plea of bankruptcy is interposed as a defense, may set up the new promise in his replication to the plea, as in analogous cases involving the defense of infancy and the statute of limitation. 1 Pars. Cont. 434-5* (6th ed.), note *v*, and cases cited.

In *DePuy v. Swart*, 3 Wend. 135; 20 Am. Dec. 673, 676, while it was held that the liability of the bankrupt was referable only to the new contract, it was said to be well settled that the plaintiff could declare on the original cause of action. "The inconsistency of making the new promise the basis of the action," it was observed by MARCY, J., "and at the same time allowing the plaintiff to declare upon the antecedent debt, which has been discharged, or the remedy upon it barred, has been often presented in the courts of England and of this country; and

although it has been sanctioned, it has been looked upon as a deviation from the general rule requiring a plaintiff to state in his declaration the agreement or whole cause of action whereon his suit is brought." In *Shippey v. Henderson*, 14 Johns. 178, it was held proper for the plaintiff to sue the bankrupt on the original demand, and to reply the new promise in avoidance of the discharge set up in the plea; and such replication was decided not to be a departure from the declaration. This rule was followed in many subsequent cases in New York, including *Dusenbury v. Hoyt*, 53 N. Y. 521; s. c., 13 Am. Rep. 543, decided as late as 1873, in which the court said: "We are of opinion that this rule of pleading, so well settled, and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy." *Fitzgerald v. Alexander*, 19 Wend. 402; *Wait v. Morris*, 3 id. 394. In the case of *Field's Estate*, 2 Rawle, 351; 21 Am. Dec. 454, it was held that the new promise was substantially the meritorious cause of action; but it was said that it might be treated otherwise in the pleadings, by declaring on the old promise, although this was admitted by GIBSON, C. J., who rendered the opinion in the case to be an anomaly in pleading. There are a large number of cases supporting the same view. See Bish. Cont., § 448, and cases cited in note 3.

We have been cited to no case which holds that this long established rule of pleading is to be abandoned, where the action is one of debt brought upon a judgment of a court of record. The case of *Maxim v. Morse*, 8 Mass. 127, was brought on a judgment, and the plaintiff's replication of a verbal promise by the bankrupt to pay the debt was held to be no departure from the original cause of action, being declared to be such more in appearance than reality. The case of *Otis v. Gazlin*, 31 Me. 566, was a similar suit, in which the plaintiff successfully declared upon the judgment, instead of the new promise, and although bankruptcy was pleaded, the form of pleading was held to be correct.

A strong analogy is found in cases involving the plea of the statute of limitations. Bankruptcy, it is true, extinguishes the debt as a legal subsisting demand, while the operation of the statute is only to destroy the remedy. Yet it is settled in the one class of cases, as well as in the other, that the new promise is the true and real foundation of the cause of action, and strictly speaking, upon it alone can a recovery be had. Such is the settled doc-

 Gordon v. Tweedy.

trine of this court, and since the case of *Bell v. Morrison*, 1 Pet. 351, decided by Judge STORY more than fifty years ago, it may be regarded as the recognized doctrine in this country. *Bradford v. Spyker*, 32 Ala. 134; Angell Lim. (6th ed.), § 212. Notwithstanding this fact, the rules of pleading permit the plaintiff to declare upon the original debt, and when the statute of limitations is pleaded, to reply the new promise. Angell Lim., § 288. In *Bradford v. Spyker*, 32 Ala. 148, this feature of pleading was said to be an anomaly in the law; but the court approved it, as sanctioned by long practice rather than in principle, quoting the language of BEST, C. J., in *Upton v. Else*, 12 Moore, 303 (22 Eng. Com. Law, 451), where he said: "Probably, the new promise ought in strictness to be declared on specially; but the practice is inveterate the other way, and we cannot get over it."

The practice adopted in the present action of declaring on the original debt, where the bankruptcy of the defendant is pleaded, has prevailed for a long time in this State. Though an anomaly in the law, we can see no good to result from abolishing it by judicial decision, but rather inconvenience and confusion. Admitting it to be wrong in principle, we feel justified in permitting it to stand, if for no other reason, because it is supported, with few exceptions, by the antiquity of uninterrupted practice, not only in this State, but generally in the courts of England and America.

[Omitting minor points.]

There are some other exceptions in the record, based upon the rulings of the court on the evidence. These we have examined, and find nothing of merit in them.

The judgment of the court below is, in our opinion, free from error, and it is accordingly affirmed.

Judgment affirmed.

 GORDON V. TWEEDY.

(74 Ala 283.)

Marriage — dower — value of inchoate, how ascertained — judicial notice.

The value of a wife's inchoate right of dower must be ascertained by the "American Table of Mortality," and judicial notice will be taken of it

CREDITOR'S bill. The opinion states the point.

Phelan & Wheeler, for appellants.

E. H. Foster, and *R. O. Pickett*, contra.

SOMERVILLE, J. [Omitting other matters.] It does not appear from the record what rule, if any, was adopted by the register in ascertaining the value of Mrs. Tweedy's contingent or inchoate right of dower in the lands conveyed by her husband to Houston and Bynum. We are aware of no possible way in which this can be done, except by a calculation based on what are commonly called "Annuity Tables." The rule was so declared when the case was last before us. *Gordon v. Tweedy*, 71 Ala. 202. The question was considered in *Jackson v. Edwards*, 7 Paige, 386, decided in 1839, by Chancellor WALWORTH. After observing that the annuity tables furnish the means of ascertaining "the probable value of the wife's contingent right of dower during the life of the husband," showing, as they do, not only the value of annuities which depend upon the continuance of single lives of different ages, but upon the continuance of two or more joint lives, the following rule is declared: "The proper rule," he adds, "for computing the present value of the wife's contingent right of dower, during the life of the husband, is to ascertain the present value of an annuity for her life, equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and husband; and the difference between these two sums will be the present value of her contingent right of dower. 7 Paige, 408, citing McKean's Pr. L. Tables, 23, § 4; Hendry's Ann. Tables, 87, Prob. 4.

At the time this rule was announced, more than forty years ago, the courts were accustomed to resort to the "Northampton" and the "Carlisle" Tables of observation, showing the probabilities of human life by actual observation in the towns of Northampton and Carlisle, England. These deaths however were not taken from selected lives, but from the population generally. The field was so circumscribed that they have never been deemed entirely reliable. We judicially know that the business of life insurance has made rapid advancement in modern times, especially within the past

Gordon v. Tweedy.

twenty years. New fields of observation have been explored, based upon the combined and actual experience of American life insurance companies. This has led to the tabulation of results in what is now known as the "American Table of Mortality," which is now regarded as the orthodox standard throughout the United States and the Canadas. This table is based on the lives of insurable, or healthy persons, and is known to be now in use generally by modern life insurance companies, for the arithmetical estimate of valuations. We are of opinion that for these reasons our courts should resort to the "American Table of Mortality" as a basis for the calculation of annuities dependent on the probabilities of human life in this country.

We see no reason why the chancellor, or register, should be precluded from taking judicial knowledge of both the existence of this table and its contents. It is customary for courts to take judicial knowledge of what ought to be generally known within the limits of their jurisdiction. This cognizance may extend far beyond the actual knowledge, or even the memory of judges, who may therefore resort to such documents of reference, or other authoritative sources of information as may be at hand, and may be deemed worthy of confidence. The rule has been held, in many instances, to embrace information derived informally by inquiry from experts. 1 Greenl. Ev., § 6; Gresley Ev. 295.

The register, in taking the account, will follow the rule above announced, having a proper regard to the value of the property, the health and age of the parties. The better practice would be, to examine a medical expert, with the view of ascertaining whether any change in the value of the dower should be reported, by reason of the failing or imperfect health of the parties at the time of the transaction.

The decree is reversed, and the cause is remanded, that the issues relating to dower, taxes and improvements alone may be determined on a further reference to the register.

Decree reversed, and cause remanded.

Lewis v. Bruton.

LEWIS v. BRUTON.

(74 Ala. 317.)

Wager — action against stakeholder.

Where a wager is made on the result of a public election, and the stakeholder pays the stake after the result is generally known and publicly announced, but before the issue of the official certificate, the loser, having after the payment but before the issue of the certificate notified him not to pay, may maintain an action against him for his stake.

ACTION to recover a stake on a wager. The opinion states the point. The plaintiff had judgment below.

D. P. Lewis and J. Wheeler, for appellant.

W. P. Chitwood, contra.

STONE, J. We do not think section 2131 of the Code of 1876 exerts any influence in this case, except to the extent that it declares all contracts based on a gambling consideration to be void. The second clause of the section has reference to suits between the parties making the wager. It sheds no new light on the question of the stakeholder's liability.

The rule is general, both in England and in this country, that when a wager is made and the stakes are deposited with a stakeholder, either party may, at any time before the result is ascertained and the money paid over to the winner, withdraw from the illegal transaction, notify the stakeholder, and demand and recover his deposit-money. Such is the general rule and it has been long so settled in this State. *Shackleford v. Ward*, 3 Ala. 37; *Ivey v. Pfifer*, 11 id. 535; *Davis v. Orme*, 36 id. 540; *Hawley v. Bibb*, 69 id. 52; 1 Whart. Cont., § 452; 2 Pars. Cont. 626; *Collamer v. Day*, 2 Vt. 144; *Tarleton v. Baker*, 18 id. 9; *McKee v. Manice*, 11 Cush. 357; *Love v. Harvey*, 114 Mass. 80; *Fisher v. Hildreth*, 117 id. 558; *Morgan v. Beaumont*, 121 id. 7. This rule is not universal. Whart. Cont., § 452.

In the present case the stakeholder, Lewis, paid the money to the

Lewis v. Bruton.

supposed winner before he was notified by his adversary not to pay it over. It does not seem to be disputed that Bruton did give Lewis notice not to pay the money over to Jones, the alleged winner. The contention is that the payment was made after the result of the election was generally known and publicly proclaimed.

Members of Congress are elected the first Tuesday after the first Monday in November. Code of 1876, § 248. On the Saturday next after the election (an interval of four days), the Probate judge and other named officers, as supervisors, are required "to make a correct statement from the returns of the votes from the several precincts of the county, of the whole number of votes given therein for each office, and the person to whom such votes were given. Code of 1876, § 291. A certified statement of the vote cast in the county, as required above to be made by the supervisors, is to be forwarded by the Probate judge to the secretary of State, immediately, and on the same day (Saturday) the service is performed. Code, § 292. "It shall be the duty of the secretary of State, within ten days after receiving the returns of election from the Probate judges of each county, to furnish, from a count of the actual vote cast, as the same appears by the returns certified to him, certificates of election to such persons as may be ascertained to be elected to any office in this State." Code, § 294. It is thus shown that the certificate of election may not in fact be issued by the secretary of State until sixteen or more days have elapsed after the election has been held. Considering the many duties of the same kind cast on the secretary of State at the same time, and the uncertain time necessary for the various county returns to reach the secretary of State, it is not reasonable to suppose the certificates of election will be made out in much less than ten, possibly fifteen, days after the day of election.

In the present record there is an absence of proof when the certificate of election was issued — uncertainty as to the time when the money was paid by the stakeholder to the supposed winner, and when the notice was given by Bruton to him not to pay over the money to Jones. The reasonable inference from the testimony is, that both the payment and the notice not to pay preceded the issue of the certificate of election. The decision of these questions however is rendered unnecessary, as no ruling appears to have been made upon them. The charges asked and refused all ignore these questions, and claim a verdict for defendant, in the absence

of such certificate, if the money was in fact paid before notice not to pay, and after the result of the election was "publicly announced." The certificate afterward issued, it is contended, related back to the election, and cured the irregularity. We cannot assent to this. A payment before certificate of election issued is at the peril of the stakeholder; and if the authority to pay be revoked, or the payment countermanded, before the actual issue of the certificate, an action for money had and received lies against the stakeholder. The Circuit Court did not err in refusing the charges asked. Whether there was a sufficient revocation in this case we do not consider, as the question is not raised. *Patterson v. Clark*, 126 Mass. 531.

We do not propose, in this case, to consider which of the opposing candidates was in fact elected. We are in no sense assuming to make ourselves judges of the election. As we understand the law, that question was not, and at the time the money must have been paid over, could not have been raised. We take it for granted, if the certificate of election had been issued before notice was given to the stakeholder not to pay, the charges asked would have been rested on that hypothesis, and not on the weaker one, that the result had been "publicly announced." In fact, we presume the Circuit Court did correctly rule on all questions not excepted to, and thus brought before us. If the money had been paid over, and the result of the election officially declared by the secretary of State, before notice to the stakeholder not to pay, we are not prepared to say this would not be a complete bar to the action, even though the money was paid before the result was officially ascertained. Such official ascertainment might heal the irregularity of premature payment, and close the door against any demand afterward made.

In what we have said, we have confined our rulings to what is known as the officially proclaimed result. We have not considered the question of the contested seat, which is public, official history, of which we take judicial notice. If necessary, we would probably hold the stakeholder would be justified in paying over the money on the official announcement, without waiting for the uncertain result of an election contest.

The demurrer to the first count of the complaint was rightly overruled. Payment to the alleged winner, before notice not to pay, was defensive matter, the averment and proof of which rested with

 South and North Alabama Railroad Company v. Wood.

the defendant. The deposit being for an illegal purpose, the depositor had till the last moment to withdraw from the transaction, by revoking the authority to pay.

Affirmed.

 SOUTH AND NORTH ALABAMA RAILROAD COMPANY v. WOOD.

(74 Ala. 449.)

Evidence — judicial notice.

Courts will not take judicial notice of the rule for the measurement of corn in the shuck, nor that a railroad car of given dimensions cannot contain three hundred bushels thereof.*

ACTION for non-delivery of corn. The opinion states the point.

Thomas G. Jones and John W. Inzer, for appellant.

STONE, J. Much that enters into and shapes human transactions is so general and uniform in its operation, as to be reducible to a rule. The flow of water, the alternation of the seasons, seed-time and harvest, the operation of mechanical powers, are of this class. So whether certain language is or not, in its very nature, obscene or insulting; whether a weapon of a particular kind is, or is not deadly; what effect a serious wound in a vital part will have; what are fermented, and what distilled spirits; these, and many other factors in judicial determination, are so generally known as to dispense with all proof of them, as a general rule. All men know them, and therefore they need not be proved. This is sometimes called judicial knowledge; frequently, common knowledge.

We do not think however that the rule for the measurement of corn in the shuck falls within this class. True, we know that a cubic yard, which consists of twenty-seven cubic feet, cannot contain one hundred bushels of corn in the shuck. Can we know precisely what it will hold? Is there any generally known, inflexible rule on the subject? So much must depend on the variety and quality of the corn, and the quantity of shuck left

* See *ante*, p. 201.

South and North Alabama Railroad Company v. Wood.

upon it, that no fixed rule can be declared. Suppose we were to declare that a box car 28x8x4 feet cannot hold 300 bushels of corn in the shuck. Can we, with any proximate certainty, say how much it will contain? A result, so variable as this, cannot become a subject of judicial cognizance. As we said, when this case was before us at a former term (71 Ala. 215; 46 Am. Rep. 309), "we have nothing to do with these questions. The jury found there was a loss, and we can only inquire whether the law for their government was correctly given in charge to them." Whart. Ev., §§ 329 *et seq.*

There is no error in the record, and the judgment of the Circuit Court is affirmed.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

HARDENMAN V. STATE.

(18 Tex. Ct. App. 1.)

Statute — construction — “movable property.”

A growing and unripe crop is not “movable” or “personal property.”

CONVICTION of fraudulent disposition of mortgaged property.
The opinion states the case.

Amzi Bradshaw, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. In substance the indictment charges that the defendant, on the third day of June, 1882, executed to J. E. Wilson a valid mortgage lien, in writing, upon “eighteen acres of cotton, then and there being movable property,” “and that he thereafter, on the first day of October, 1882, sold said cotton to divers persons with intent to defraud said Wilson,” etc.

To constitute the offense attempted to be charged in this indictment, the property upon which the lien was given must have been “personal or movable property” at the time such lien was executed. Penal Code, art. 797. It is no offense against the law of

this State to sell or otherwise dispose of real property upon which the owner has given a written lien.

Before proceeding further we should determine what meaning should be given to the words "eighteen acres of cotton," used in the indictment in describing the property mortgaged. We think that but one reasonable signification can be placed upon them, and that is that the property consisted of a cotton crop growing upon eighteen acres of land. This would be the ordinary signification of the words, and they must be thus understood. Rev. Stat., art. 3138; Penal Code, art. 10.

What character of property is a crop of growing cotton, considered with reference to the offense of which defendant stands convicted? Is it "movable property" within the meaning of article 797 of the Penal Code? If not, then it is unnecessary to consider this case further, because it is to that character of property alone that this indictment applies.

It is true that the indictment alleges that the eighteen acres of cotton were movable property. Such allegation however is but a conclusion of the pleader, and is not sufficient unless the other statements show that it was that kind of property. Thus, suppose the allegation had been that the property consisted in eighteen acres of land; followed by another allegation that the land was movable property; it would not be contended that the latter controlled the former allegation, and that therefore the indictment charged the offense known to the law. The two allegations would be repugnant to and contradictory of each other, and the indictment would unquestionably be bad. But suppose in the case before us the allegation had been that the property consisted in so many pounds of cotton, and that the same was personal property, or was movable property, these allegations would have been consistent with each other, and the latter would have determined the character of the property. In this case the allegation that the property was movable can add nothing to the sufficiency of the indictment, unless the description of the property, "eighteen acres of cotton," may mean cotton in that state or condition which would render it movable property.

We now recur to the question, is growing cotton movable property, as alleged in the indictment? "Movable" property is such as attends a man's person wherever he goes, in contradistinction to things immovable. 2 Bouv. Law Dict., word "*Movables*." Thus

Hardeman v. State.

money, jewelry, clothing, household furniture, boats and carriages are said to follow the person of the owner wherever he goes; they need not be enjoyed in any particular place; and hence they are movable. 1 Schoul. Pers. Prop 25. Certainly a crop of cotton growing upon land cannot by any stretch of the rules of construction be brought within this definition of movable property. It is most clearly a thing immovable. It may however become movable. Says the author last quoted: "Fruits, so long as they are hanging on the trees, the crops until they are gathered, and timber trees while they are standing, are things immovable, or real estate, because they are attached and appendant to the ground. But when the fruits or crops are gathered, or the trees cut down, as they then cease to be attached to the soil, they become movables." 1 Schoul. Pers. Prop. 123. We think it too plain to be controverted, or to require a further investigation of authorities, that a crop of growing cotton is immovable property, and is not within the meaning of "movable property" as used in the article of the Penal Code under which this conviction was obtained.

But it may be said that the cotton was personal if not movable property, and if so that the offense attempted to be charged could be committed in relation to it. This position is correct. If the property be either personal or movable it is the subject of the offense denounced by the Code. It is to be observed however that this indictment does not allege, or in any manner show, that the property was personal property. It characterizes the same as movable property, and the two words are by no means synonymous in their legal signification, and do not mean the same thing in the Code. There may be personal property which is not movable. Personal property not only includes movable property, but more. It is a more comprehensive word. Thus, crops growing upon land are held to be personal property, so far as not to be considered an interest in land, under the statute of frauds. 2 Bouv. Law Dict., "Personal Property." So annual crops, if fit for harvest, may acquire the character and incidents of personal property, so far as to be subject to execution as personal chattels. *Horne v. Gambrell*, W. and W. Con. Rep., § 997. But it has never been held that an ungathered crop, still appendant to the ground, is, under any circumstances, movable property. Whilst the question, as to whether or not cotton growing is personal property within the meaning of the article of the Code referred to, is not presented directly for our

determination, we deem it not improper for us to say that in our opinion crops do not become personal property, as a general rule, until they are ready to be harvested. Until that time they are regarded as partaking of the realty. 1 Schoul. Pers. Prop. 123 *et seq.*; Freeman Executions, § 113. In this case it appears from the indictment that the lien upon the cotton was given in the month of June, at which time the crop could not have been ready for gathering, and it was not therefore personal property.

In our opinion the indictment charges no offense against the law of this State, and the court erred in overruling the defendant's motion in arrest of judgment, based upon its insufficiency; wherefore the judgment is reversed and the prosecution is dismissed.

Reversed and dismissed.

HALL V. STATE.

(18 Tex. Ct. App. 6.)

Statute — construction — "decrepit."

In a statute concerning assault and battery upon "decrepit persons," these words mean those who are disabled, incapable or incompetent, from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render them comparatively helpless in personal conflicts with persons of ordinary health and strength.

CONVICTION of assault and battery. The opinion states the case.

Cowles & Story, J. L. Cobb and J. P. Cox, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. There are three counts in the indictment, each charging an aggravated assault and battery. First, that the defendant, an adult male, committed an assault and battery upon a female; second, that the defendant, a person of robust health and strength, committed an assault and battery upon a decrepit person; and third, that he went into the house of a private family and committed the assault and battery.

[Minor considerations omitted.]

Hall v. State.

As to the second count, while the evidence might be held sufficient to establish the allegation that the defendant was a person of robust health and strength, it was not sufficient to prove that the alleged assaulted party was decrepit. She was not an aged person, being only thirty-seven years old. Mr. Webster defines "aged" as follows: "Old; having lived long; having lived almost the usual time allotted to that species of being." The usual allotted time for human beings to live, prescribed by revealed law, and in accord with the law of nature, is the period of three score years and ten. It is not alleged in the indictment however that the lady was an aged person, but that she was decrepit, and we must therefore direct our attention to this specific allegation.

What meaning are we to give to the word decrepit? Words used in the Penal Code, except where specially defined by law, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject matter relative to which they are employed. Penal Code, art. 10. Mr. Webster makes the word "decrepit" a dependent of old age; that is, according to his definition, before a person can be decrepit old age must have supervened upon such person. He defines the word thus: "Broken down with age; wasted or worn by the infirmities of old age; being in the last stage of decay; weakened by age." This word is not defined in the Code, nor do we find any definition of it in the law lexicographies. In our opinion, as used in article 496 of the Penal Code, and as commonly understood in this country, it has a more comprehensive signification than that given it by Mr. Webster. We understand a decrepit person to mean one who is disabled, incapable or incompetent, from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. We think that within the meaning of the word as used in the Code, a person may be decrepit without being old; otherwise the use of the word in the Code would be tautology. It certainly was intended by the legislature that it should signify another state or condition of the person than that of old age. Thus where the party assaulted was a man about fifty years old, disabled by rheumatism to such an extent that he was compelled to carry his arm in an unnatural position, and in such a manner as to render it almost if not entirely useless

Cartwright v. State.

to him in a personal difficulty, it was held, that whilst his condition might not come technically within the meaning of the word decrepit as defined by Mr. Webster, yet it might with propriety be said that it fell in the measure of that word as used in common acceptation. *Bowden v. State*, 2 Tex. Ct. App. 56.

But giving to this word its broadest meaning, we do not think that the proof in this case shows that the alleged injured person was decrepit. She testifies herself that she had been sick off and on during the summer; and that she had been in bed all day the day of the difficulty. It is not shown what was the character of her sickness, or what effect it had produced upon her. On the other hand, it was proved that on the evening of the difficulty, and at the time of its occurrence, she was up and going about the house; that just before she was assaulted by the defendant she had gone up stairs and thrown his trunk of clothes out of the house through a window, and had also thrown his satchel out of the house. It was further proved that before defendant struck or attempted to strike her she struck him with a chair. Considering all the testimony upon this question, we are of the opinion that it fails to show that the lady, at the time of the alleged assault upon her, was in a decrepit condition within the meaning of the law. Therefore the conviction cannot be sustained under the second count.

Because in our opinion the verdict of the jury is not supported by the evidence, the judgment is reversed and cause remanded.

Reversed and remanded.

CARTWRIGHT V. STATE.

(16 Tex. Ct. App. 473.)

Trial — failure to condemn applause of spectators — comments of counsel.

On a murder trial, at the end of the opening address of the prosecuting attorney, the audience applauded. In his closing argument he alluded to this, and approved it. The court did not check nor reprimand the audience nor the counsel, nor caution the jury. This, it seems, was error.*

* See note, 48 Am. Rep. 836.

Cartwright v. State.

CONVICTION of murder. The opinion states the point.

J. A. Carroll and Lovejoy, Dickenson & Patterson and Piner & Smith, for appellant.

J. H. Burts, assistant attorney-general, and *W. Poindexter*, for State.

WILLSON, J. [Omitting other matters.] We are called upon by a bill of exceptions to notice another matter which occurred upon the trial. Upon the conclusion of the argument of the counsel who opened the case on the part of the State, the audience, which was composed of some four hundred people, cheered and applauded the speaker. This was late at night and further argument was postponed until the next morning. The court did not reprimand the audience, or in any way express disapprobation of the improper demonstration, nor was the jury cautioned against suffering this conduct of the audience to influence their minds in the consideration of the case. On the next morning, counsel for defendant were permitted in their addresses to the jury to comment upon and condemn without restriction the occurrence of the night before. In reply to them, counsel for the State, in the concluding argument, alluding to the demonstration made by the audience said, "it was a spontaneous outburst of approval by the audience of this cause, after they had heard it truthfully represented by the State." This remark was not reproved by the court, and still the jury were not admonished by the court to disregard this extraneous matter, and to guard themselves against being influenced by it.

It is unnecessary for us to determine whether or not we would suffer this conviction to stand if this bill of exception presented the only ground of reversal. It is enough for us to say now that we think the court should have taken prompt and decisive action on the occasion, and should have endeavored by its condemnation of the proceeding, and its admonitions to the jury, to prevent any prejudice to the defendant by such reprehensible conduct. And in this effort on the part of the court counsel for the State should have united. As the matter is presented to us by the bill of exception, we cannot say that the defendant has had a fair and impartial trial upon the law and the evidence of the case.

Because of the errors in the charge of the court, the judgment is reversed and the cause is remanded.

Reversed and remanded.

INDEX.

ACKNOWLEDGMENT.

See DEED, 180 ; MARRIAGE, 88.

ACTION.

Lawful act maliciously done.] No action lies for the malicious posting of a notice by an employer forbidding his employees to trade with a person named therein. *Payne v. Western and Atlantic Railroad Company* (18 Lea, 507), 666.

See AGENCY, 25 ; BAILMENT, 5 ; BANKRUPTCY, 809 ; EVIDENCE, 508 ; JUDGMENT, 491 ; NEGLIGENCE, 188, 515 ; NEGOTIABLE INSTRUMENT, 228 ; OFFICE, 107 ; RELIGIOUS SOCIETY, 462 ; STATUTE, 655 ; WAGERS, 816.

ADULTERY.

See CRIMINAL LAW, 207.

ADVERSE POSSESSION.

Tenants in common.] Where a tenant in common conveys the whole land to a third person, and the grantee records the deed and enters under it, makes valuable improvements, pays the taxes, and receives the rents and profits without offering to account, the cotenant is chargeable with actual notice, and the possession is effectual against him. *Unger v. Mooney* (63 Cal. 586), 100.

AGENCY.

1. **Action against insurance agent for fraud — damages.]** One fraudulently induced by an insurance agent to take a policy may rescind the contract and recover from him the premium paid. *Hedden v. Griffin* (186 Mass. 229), 25.
2. **Contract between insurance company and agent — termination.]** A life insurance company contracted to pay its agent certain commissions for procuring insurance and for renewals, without specifying any term of duration. The company went out of business and assigned the policies so procured to another company. *Held*, that this terminated the agent's right to commissions on renewals. *North Carolina State Life Insurance Company v. Williams* (91 N. C. 69), 637.

ANIMALS.

See ESTRAYS, 839 ; FERRY, 484 ; NEGLIGENCE, 188.

ARBITRATION.

See LANDLORD AND TENANT, 161.

ARREST.

Of privileged witness.] No action lies for the arrest on civil process of a witness returning home from court and privileged from arrest. *Smith v. Jones* (76 Me. 188), 598.

See INSANITY, 804 ; MALICIOUS PROSECUTION, 117.

ASSAULT.

See INSURANCE, 469.

ASSIGNMENT.

See INSURANCE, 570.

ASSIGNMENT FOR CREDITORS.

See PARTNERSHIP, 847.

ATTORNEY

Disbarring — contempt.] An attorney, stopping a judge on the street, and using abusive language to him concerning his judicial action in a case pending before him, is guilty of "misconduct in office," warranting disbarring. *People v. Green* (7 Colo. 237), 851.

BAILMENT.

Injury by third person — action by bailee.] The plaintiff hired a horse and wagon. The defendant negligently injured the wagon while in his possession. At the plaintiff's request the owner had it repaired and the expense charged to the plaintiff. *Held*, that the plaintiff might recover for the damage without having paid such expense. *Brewster v. Warner* (136 Mass. 57), 5.

See CARRIER ; RAILROAD ; WAREHOUSEMAN.

BANKRUPTCY.

New promise — action.] When a subsequent promise is made to pay a debt discharged in bankruptcy, the creditor may sue on the new promise, or he may sue on the original debt and reply the new promise to a plea of discharge. *Wolfe v. Eberlein* (74 Ala. 99), 809.

BANKS.

1. Application of deposit to note.] A bank holding the note of a depositor, his deposit being insufficient to pay it at maturity, is not bound to apply his subsequent deposits, for the benefit of the indorser, although sufficient. *People's Bank of Wilkesbarre v. Legrand* (103 Penn. St. 809), 126.

2. Paper for collection — title.] The plaintiff deposited with the Mastin Bank a check drawn by a third person, for collection and credit to his account. In accordance with an arrangement between the parties the Mastin Bank gave the plaintiff immediate credit for the check, and the plaintiff immediately drew against it. The Mastin Bank sent the check to defendant,

BANKS — *Continued.*

its corresponding bank, who charged it to the drawer, and credited the Mastin Bank. The latter meantime had failed and made an assignment, but the defendant did not know it. *Held*, that the plaintiff could not recover on the check from the defendant. *Ayres v. Farmers and Merchants' Bank* (79 Mo. 421), 235.

3. National — changed from State — guaranty.] A National bank, changed from a State bank, may maintain an action on a continuing guaranty for loans, held by it before the change, for loans both before and after the change. *City National Bank of Poughkeepsie v. Phelps* (97 N. Y. 44), 518.

Deposit.] See WILL, §26.

BASTARDY.

Liability for support.] A man marrying a woman, known by him to be pregnant by another, is alone liable for the support of the child. *State v. Shoemaker* (62 Iowa, 843), 146.

BEQUEST.

See WILL.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BOUNDARY.

1. On pond.] A boundary "by the shore" of a pond conveys to low water-mark. *Stevens v. King* (78 Me. 197), 609.
2. On river.] A boundary by a line running "to the river and thence on the river shore," conveys to the center of the stream. *Sleeper v. Laconia* (60 N. H. 201), 811.

BRIBERY.

See STATUTE, 700.

BRIDGE.

See NEGLIGENCE, 894, 561.

BROKER.

See CONTRACT, 181.

CARRIER.

Delivery to — custom — rules.] A deposit of cotton in a street along the side of the platform of a railroad depot, or in the railroad cotton-yard, for shipment, in pursuance of a custom or usage adopted or sanctioned by the depot agent, may amount to a delivery to the railroad company, although no receipt is given by the agent to the shipper, and such usage or custom is contrary to the established regulations of the company, known to the shipper, and no notice thereof is traced to the superintendent or managing agent of the company. *Montgomery and Eufaula Railway Company v. Kolb* (78 Ala. 896), 54.

CHARITY.

See WILL, 84.

INDEX.

CHECK.

See NEGOTIABLE INSTRUMENT, 238.

CHURCH.

See RELIGIOUS SOCIETY, 138.

COLLATERALS.

See PLEDGE, 592.

CONSIDERATION.

See DEED, 48.

CONSPIRACY.

See EVIDENCE, 601.

CONSTITUTIONAL LAW.

1. Construction—"roadway, road-bed."] Steamers used by a railroad company in transporting freight cars across water intervening between the termini of the tracks are not taxable as a part of the "roadway" or "road-bed." *City and County of San Francisco v. Central Pacific Railroad Company* (68 Cal. 467), 98.
 2. Inter-State commerce — prohibition — Sunday freight trains.] A statute subjecting to punishment railway companies running their freight trains on Sunday is not unconstitutional, although the freight in question is in course of transportation to other States. *State v. Railroad Company* (24 W. Va. 788), 290.
 3. "Justice or judge" — justice of peace.] A justice of the peace is not within the constitutional provision that "no person shall hold the office of justice or judge of any court" after becoming seventy years old. *People v. Mann* (97 N. Y. 580), 558.
 4. Legislation restoring competency of infamous witness.] The legislature may not restore the competency of a witness rendered incompetent by reason of conviction of felony. *State v. Grant* (79 Mo. 118), 218.
 5. Limit of municipal indebtedness.] Although the Constitution forbids any municipal corporation to incur an indebtedness exceeding a specified percentage of its taxable property, yet a city may contract for a necessary supply of water for twenty years at an expense in the aggregate exceeding that limit, but to be defrayed annually, as the water is furnished, and not exceeding the constitutional limit in any year. *City of Valparaiso v. Gardner* (97 Ind. 1), 416.
 6. Regulation of marriage — retrospective operation.] A statute prohibited marriage between persons nearer of kin than first cousins, and a subsequent statute provided that such marriage followed by birth of issue should not be declared void after the death of either party. *Held*, that the proviso applied to prior marriages. *Baity v. Cranfill* (91 N. C. 298), 641.
 7. Statute authorizing act enjoined as nuisance.] The ringing of mill-bells at a certain hour having been enjoined as a nuisance, the legislature may authorize the ringing at that hour. *Sawyer v. Davis* (138 Mass. 239), 27.
- See* ELECTIONS, 606 ; EMINENT DOMAIN, 7; PARDON, 71, 877, 684 ; TAKATION, 156.

CONTEMPT.

1. **Constructive — libel on judges.]** A publication in a newspaper when and where a court is sitting, referring to a case pending therein, and charging the judges with having in a political caucus advised the action out of which the case arose, and with having pledged themselves to the caucus to adjudge its action legal, and to decide the case before an approaching political convention, is a contempt which may be summarily punished as "misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice." *State v. Frew* (24 W. Va. 416), 257.
2. **Forfeiture of recognizance.]** Where one accused of crime forfeits his recognizance to appear for trial, he is not guilty of contempt. *In Matter of Dill* (82 Kans. 668), 505.

See ATTORNEY, 851.

CONTRACT.

1. **Against public policy.]** The owners of land in a city agreed with the owners of an adjacent building that if the latter would offer that building to the government for a nominal rent for a post-office for ten years, and use all "proper persuasion" to secure its acceptance, they would pay them a certain sum annually for that period, in case of the government's acceptance. The building was accepted by the government, one of the owners, a personal friend of the postmaster-general, truthfully representing to him that the situation was suitable, and notes were given by the defendants for the annual installments as agreed. *Held*, that the agreement was against public policy and the notes were void. *Elkhart County Lodge v. Crary* (98 Ind. 238), 746.
2. **For purchase of goods on margins.]** A contract for the purchase of wheat, to be delivered in the future, the purchaser putting up margins, and both parties understanding that the wheat is not to be delivered, but that settlement shall be made by the payment of the difference between the market price at the day fixed for delivery and the purchase price, is void. *Whitesides v. Hunt* (97 Ind. 191), 441.
3. **Implied — services.]** The owner of a few of a large number of bales of cotton stored in a burning warehouse, having saved a part of the cotton, declaring at the time that if he could not hold it under the law, he would surrender it on being paid for his labor and expense in saving and baling it, and the warehouseman, with knowledge of the services and of the terms on which they were being rendered, having assented thereto or acquiesced therein, *held*, a contract entitling the person rendering the services, the cotton not being identified as his own, to payment for his labor and expense, and to its possession until he was paid. *Seals v. Edmondson* (78 Ala. 295), 51.
4. **License — implied extension.]** The defendant, in consideration of a specified yearly compensation, payable monthly, gave the plaintiff the exclusive privilege of placing advertisements in its cars for two years from December 30, 1876. After the expiration of that time, without further agreement, the plaintiff continued to place advertisements in the cars, making the like

CONTRACT — Continued.

monthly payments, until May 1, 1881, when the defendant refused to allow him to do so any longer. In an action for damages, *held*, that the defendant was not bound to permit him to continue the advertisements for the rest of the year 1881, and that the action was not maintainable. *Chase v. Second Avenue Railroad Company* (97 N. Y. 884), 581.

5. **Public policy — unlicensed broker.]** An unlicensed real estate agent, subject to penalty for doing business without a license, cannot recover compensation under contract for such business. *Johnson v. Hulings* (108 Penn. St. 498), 181.

6. **Restraint of trade.]** On the sale of a stock of goods and a lease, the seller engaged not to re-engage in that business for five years. *Held*, void. *Wiley v. Baumgardner* (97 Ind. 66), 427.

See CORPORATION, 212; DAMAGES, 246; GUARDIAN, 78; INSURANCE; LICENSE, 152; LANDLORD AND TENANT, 161; MASTER AND SERVANT, 770; MUNICIPAL CORPORATION, 118; STATUTE OF LIMITATIONS, 844; WILL, 826.

CONTRACTOR.

See MASTER AND SERVANT.

DECLARATIONS.

See EVIDENCE.

DEED.

See BOUNDARY, 811, 609; MARRIAGE, 82, 116

DEVISE.

See WILL.

DISTRESS.

See LANDLORD AND TENANT, 777.

DOWER.

See MARRIAGE, 818.

CONTRACTOR.

See MUNICIPAL CORPORATION, 118.

CONTRIBUTION.

See NEGOTIABLE INSTRUMENT, 1, 525.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 87, 622.

CORPORATION.

1. **Contract — ultra vires.]** A contract by a corporation organized to build a public bridge, with the proprietor of a newspaper, to give him stock of the company in consideration of his publishing articles favoring the enterprise and showing the value of it as an investment, is valid. *Lieble v. Knapp* (79 Mo. 23), 212.

CORPORATION — *Continued.*

2. **Malicious prosecution.]** An action for malicious prosecution may lie against a corporation. *Jordan v. Alabama Great Southern Railroad Company* (74 Ala. 85), 800.
3. **Right to vote by proxy.]** Unless the right is conferred by charter or by laws, members of a corporation may not vote by proxy. *Commonwealth v. Brighthurst* (108 Penn. St. 184), 119.
4. **Title to stolen stock certificates.]** A *bona fide* purchaser of certificates of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. *Barstow v. Savage Mining Company* (64 Cal. 888), 705.
See OFFICER, 107.

CRIMINAL LAW.

1. **Appeal by escaped prisoner.]** The appeal of an escaped prisoner will be dismissed. *Warwick v. State* (78 Ala. 486), 59.
2. **Disorderly house — requisites of indictment.]** In an indictment for keeping a disorderly house it is unnecessary to allege the character of the persons frequenting it. *State v. Dams* (60 N. H. 479), 331.
3. **Evidence — testimony of co-defendant.]** Where by statute an indicted person may testify on his own behalf on the trial of the indictment, one of two jointly indicted may testify against his co-defendant on his separate trial, although the indictment against himself is still pending and he has pleaded not guilty. *State v. Barrows* (76 Me. 401), 629.
4. **Former acquittal — adultery.]** On a prosecution for adultery the former acquittal of the co-defendant cannot be pleaded in bar. *Alonso v. State* (15 Tex. Ct. App. 878), 207.
5. **Libel — mitigation.]** On a criminal prosecution for libel the defendant may show in mitigation that the libel was provoked by a libel upon him by the prosecuting witness. *Hartford v. State* (96 Ind. 461), 185.
6. **Lost indictment.]** When an indictment is lost after plea the trial may proceed on a copy. *Schultz v. State* (15 Tex. Ct. App. 258), 194.
7. **—.]** A lost indictment may be supplied by a copy, upon affidavits, independent of the recollection of the judge. *It seems*, the case is covered by the Code. *State v. Gardner* (18 Lea, 184), 660.
8. **Murder — evidence — clothes of deceased.]** On a trial for murder by shooting, the clothes worn by the deceased, with the shot holes in them, may be exhibited to the jury in evidence. *Hart v. State* (16 Tex. Ct. App. 202), 188.
9. **— jurisdiction — United States fort.]** Where a mortal wound is unlawfully inflicted in a fort of the United States, and the victim dies out of the fort, the State courts have no jurisdiction, although the State statute should profess to give jurisdiction. *State v. Kelly* (76 Me. 831), 620.
10. **Twice in jeopardy — repeal of statute.]** The prisoner having been indicted for murder, the statute was so amended as to render it illegal to convict him of murder, and without any saving clause, but not so as to affect the crime of manslaughter. He was then tried and convicted of murder. *Held*, that he might be subsequently tried under the same indictment for manslaughter. *Garvey's Case* (7 Colo. 884), 858.

INDEX.

CUSTOM.

See CARRIER, 54.

DAMAGES.

1. **Exemplary — tort punishable as a crime.]** In a civil action for a tort punishable as a crime exemplary damages may not be awarded. *Murphy v. Hobbs* (7 Colo. 541), 366.
2. **Measure — breach of contract to convey land.]** If a vendor sells land with warranty of title, and at the time the land has been rented by his agent, without his direction or knowledge, and the vendee is thereby delayed in getting possession, the measure of damages is the fair rental value for the lost time, and *prima facie* the rent agreed to be paid by the tenant is the fair rental value. *Moreland v. Mets* (24 W. Va. 119), 246.
3. **Proximate cause.]** The defendant left a train of cars standing entirely across a highway crossing near its station, and the plaintiff, desiring to reach the station, undertook to drive with a horse and cart at a point where there was no crossing and the track was raised above the ground, and he was thrown off by the jostling of the cart and injured. *Held*, that the injury was not the proximate result of the defendant's conduct. *Jackson v. Nashville, Chattanooga and St. Louis Railway* (13 Lea, 491), 663.
4. **—.]** Where one is injured by the negligence of another, and the injury renders the system more susceptible to disease and less able to resist it, and death results from such disease, the death is legally attributable to such negligence. *Terre Haute and Indianapolis Railroad Company v. Buck* (96 Ind. 846), 168.

DECLARATIONS.

See EVIDENCE, 615.

DEED.

1. **Acknowledgment — curing defect.]** A notary public having made and delivered a defective certificate of acknowledgment of a deed cannot amend it in the absence of the grantor. *Enterprise Transit Company v. Shedy* (108 Penn. St. 492), 180.
2. **Consideration — illicit intercourse.]** A deed executed and delivered in consideration of future illicit intercourse, the grantees being in possession, vests title. *Hill v. Freeman* (78 Ala. 200), 48.

See BOUNDARY, 811, 609.

DEVISE.

See WILL.

DISORDERLY HOUSE.

See CRIMINAL LAW, 381.

DISTRESS.

See LANDLORD AND TENANT, 277.

DIVORCE.

See MARRIAGE.

DOWER.

See MARRIAGE, 818.

EASEMENT.

Prescription — floatage — injunction — parties.] The defendant, claiming a prescriptive right in the public, proposed to float logs down a private stream running across the plaintiff's land, whenever he chose. The act would do some injury to the banks and other lands of the plaintiff. In thirty years the stream had been so used by not more than twelve persons, and by not more than three or four in any year, and for not more than from three to six days in any year. *Held* (1), that no prescription was established; (2), that all parties asserting the right might be joined as defendants; (3), that an action lay to restrain the defendants and settle the plaintiff's rights. *Meyer v. Phillips* (97 N. Y. 485), 588.

EJECTMENT.

See VENDOR AND PURCHASER, 679.

ELECTIONS.

Voters — residence — student.] Although the Constitution provides that the residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary is situated, yet he may gain the right to vote there if he intends to make that place his permanent abode, independent of his sojourn as a student. *Sanders v. Getchell* (76 Me. 158), 606.

See WAGER, 816.

EMANCIPATION.

See INFANCY, 567.

EMINENT DOMAIN.

Telegraph poles on highway.] The legislature may authorize the erection of a telegraph line on a highway without compensation to the owners of the fee. *Pierce v. Drew* (186 Mass. 75), 7.

ESCAPE.

See CRIMINAL LAW, 59.

ESTOPPEL.

See EVIDENCE, 508 ; MARRIAGE, 88.

ESTRAYS.

Right of finder to use.] Estrays may not be used by the finder unless it is necessary for their preservation, and for the benefit of the owner. *Weber v. Hartman* (7 Colo. 18), 839.

EVIDENCE.

1. Estoppel by omission to answer letter.] A letter written by one party to a transaction to the other party, after the transaction, giving his version of it, and not answered by the other party, is not competent in evidence against the latter as an admission. *Leonard v. Tillotson* (97 N. Y. 1.), 508.

EVIDENCE — *Continued.*

2. **Expert — time to burn fallow.]** The proper time to burn a fallow is not a question of expert evidence. *Ferguson v. Hubbell* (97 N. Y. 507), 544.
3. **— weight of.]** In an ordinary case it is error to instruct the jury that expert medical testimony should be received and weighed with caution. *Atchison, Topeka and Santa Fe Railroad Company v. Thul* (82 Kans. 255), 484.
4. **Joint assault — conspiracy.]** In an action against several for a joint assault, evidence of prior and subsequent misconduct on the part of some of the defendants, tending to show a conspiracy, implicates only those committing such acts. *Strout v. Packard* (76 Me. 148), 601.
5. **Judicial notice.]** Where every locality of two hundred inhabitants may incorporate itself as a town, the courts will not take judicial notice of such incorporation. *Temple v. State* (15 Tex. Ct. App. 304), 200.
6. **—.]** Courts will not take judicial notice of the rule for the measurement of corn in the shock, nor that a railroad car of given dimensions cannot contain three hundred bushels thereof. *South and North Alabama Railroad Company v. Wood* (74 Ala. 449), 819.
7. **Nuisance — fright of horses.]** In an action for a personal injury by the fright of a horse by the escape of steam from the defendant's mill, situated on the edge of a highway, evidence that other safe horses had been frightened by it is admissible. *Crocker v. McGregor* (76 Me. 282), 611.
8. **Partnership — firm books.]** To prove a partnership the partnership-books alone are not competent evidence, but in connection with evidence tending to prove the partnership and access to and knowledge of the books, are competent. *Bryce v. Joynt* (63 Cal. 375), 94.
9. **Parol — to explain ambiguity.]** A legacy being provided for "the Bible Society," parol evidence is competent to show what society was meant, and evidence that an annual contribution was taken for one of them in the testator's church is competent. *Tilton v. American Bible Society* (60 N. H. 377), 321.
10. **Pedigree — declarations.]** To prove the illegitimacy of a claimant of an intestate estate, the declarations of the intestate's deceased sister, in whose family the claimant was born and brought up and intestate lived, are admissible, when made *ante litem motam*. *Northrop v. Hale* (76 Me. 306), 615.

See CRIMINAL LAW, 188, 629; INFANCY, 567; MORTGAGE, 487; NEGOTIABLE INSTRUMENT, 1; PARTNERSHIP, 522; TRIAL, 724; WITNESS,

EXECUTION.

Levy on replevied chattel.] A replevied chattel in possession of the sheriff is not liable to execution against the same defendant in another action. *First National Bank of Oswego v. Dunn* (97 N. Y. 149), 517.

See INJUNCTION, 781; PLEDGE, 592.

EXECUTOR AND ADMINISTRATOR.

Liability for loss of money by failure of depository.] An administrator is not liable for the loss of estate funds deposited by him in a bank generally reputed and supposed by him to be solvent, by the subsequent failure of the bank. *Norwood v. Harness* (98 Ind. 184), 789.

EXPERT.

See EVIDENCE, 484, 544.

EXTRADITION.

Constructive flight.] A person arrested as a fugitive from justice on a warrant issued by the governor of Alabama, in pursuance of a requisition by the governor of Pennsylvania, based on an indictment found in that State, for false pretenses, may show, on *habeas corpus*, that he was not in the State of Pennsylvania at the time the offense is alleged to have been committed, and has never been there since : that the goods in question were obtained by purchase from an agent of the prosecutor in the State of New York, to whom the false representations, if any, were made ; and that he has never fled from the State of Pennsylvania, and was therefore not a fugitive from justice. *In re Mohr* (78 Ala. 508), 68.

FERRY.

Responsibility for horses.] A ferryman receiving horses in charge of a driver for transportation is not liable for an accident to them, in the absence of negligence on his part. *Yerkes v. Sabin* (97 Ind. 141), 484.

See NEGLIGENCE, 87.

FIXTURES.

Building — vendor and purchaser.] A purchaser in possession of land under an oral contract of sale built a frame house thereon. The vendor afterward repudiated the contract and took possession of the house. *Held*, that the purchaser could maintain replevin for it. *Waters v. Reuber* (16 Neb. 99), 710.

FRAUD.

See AGENCY, 25 ; SALE, 804 ; STATUTE OF LIMITATIONS, 575.

GIFT.

See WILL, 449.

GUARDIAN.

Ad litem — power to contract for attorney fees.] A guardian *ad litem* cannot bind those whom he represents by a contract with an attorney, fixing his compensation in the suit. *Cole v. Superior Court* (63 Cal. 86), 78.

GUARANTY.

1. Continuing.] The following is not a continuing guaranty : " Please deliver to H. goods as he may want from time to time, not exceeding in amount \$800, and if not paid for by him within thirty days I will be responsible for the same. *Cutler v. Ballou* (138 Mass. 337), 85.

GUARANTY — *Continued.*

2. Continuing notice of acceptance and default.] Under a written guaranty to be responsible for indebtedness incurred before a certain day, notice of acceptance and default is unnecessary. *Bank of Newbury v. Sinclair* (60 N. H. 100), 807.

See BANKS, 518.

GUEST.

See INNKEEPER, 684.

HIGHWAY.

See NEGLIGENCE, 188, 580.

HUSBAND AND WIFE.

See MARRIAGE.

INDICTMENT.

See CRIMINAL LAW, 600.

INFANCY.

1. Coverture — disaffirmance of deed.] A female infant conveyed her land, and afterward married in infancy. On marriage she left the State. She came of age in 1858. In 1876 she and her husband brought ejectment for the land. Meantime she had been absent and silent, and the grantee had made improvements. *Held*, maintainable. *Birch v. Linton* (78 Va. 584), 881.
2. Emancipation — evidence of.] The minor son of one of the partners in a firm was apprenticed to the firm, and remained until after the firm made a general assignment for creditors. No express emancipation of the plaintiff was shown, but a separate wages account was kept by the firm in the son's name; the wages were not credited to or claimed by the father; the minor drew a small sum on account of his wages; and he received from the assignee his wages earned after the assignment. *Held*, in an action by the son after majority, that the question of emancipation was for the jury. *Beaver v. Bare* (104 Penn. St. 58), 567.

See PARENT AND CHILD, 802.

INJUNCTION.

1. Against levying on land.] The owner of lands may have an injunction prohibiting the sheriff from levying thereon an execution issued in an action to which he was not a party. *Bishop v. Moorman* (98 Ind. 1), 781.
2. Against tax sale.] The sale of personal property for unpaid taxes will not be restrained unless it is of peculiar value to the owner, and it is manifest that great injury would result from the sale. *White v. Stender* (24 W. Va. 615), 283.

See CONSTITUTIONAL LAW, 27; EASEMENT, 588; NUISANCE, 721, 736; TENANCY IN COMMON, 686.

INNKEEPER.

Refusal to receive guest.] An innkeeper is not justified in refusing to receive a member of a militia company as a guest, merely because other militiamen, received as guests on the same occasion, had misconducted in the inn. *Atwater v. Sawyer* (76 Me. 538), 634.

INSANITY.

Arrest without process.] An insane person may be arrested and detained without legal process, only when it is reasonably necessary. *Kelcher v. Putnam* (60 N. H. 80), 804.

INSURANCE.

1. **Forfeiture — paid-up policy.]** Where a policy of life insurance provided that the company, if requested, should "after the payment of premiums for two full years, issue a paid-up policy," but was conditioned to be void for non-payment of premiums when due, *held*, that such request would not be effectual if not made until after a default in payment of premiums. *Smith v. National Life Insurance Company* (103 Penn. St. 177), 121.
2. **Interest — assignment.]** A. insured his life for the benefit of B., who had no insurable interest. B. assigned the policy during A.'s life to C., who had no insurable interest. C. paid assessments, and on A.'s death collected the insurance. *Held*, that A.'s administrator could recover the same from C., less the assessments. *Gilbert v. Moose* (104 Penn. St. 74), 570.
3. **Sale of property between partners — increase of risk.]** The sale by one partner of his share of the partnership property to another partner and the taking a mortgage back are not a breach of a condition in an insurance policy against a sale of the property, nor necessarily an increase of the risk. *Powers v. Guardian Fire and Life Insurance Company* (136 Mass. 108), 20.
4. **Severability.]** Under a fire insurance policy conditioned against alienation without notice, such alienation of one of several parcels avoids the policy, unless it can be said as matter of law that the remaining risk is not increased. *Baldwin v. Hartford Insurance Company* (60 N. H. 423), 824.
5. **"Violation of law" — assault.]** A life insurance policy was conditioned to be void if the insured should die "in the known violation of law." He assaulted a married woman, without cause or justification, and her husband, while defending her, killed him. *Held*, that the policy was avoided. *Bloom v. Franklin Life Insurance Company* (97 Ind. 478), 469.

JEOPARDY.

See CRIMINAL LAW, 858.

JUDGE.

Libel on.] *See CONTEMPT, 257.*

INDEX.

JUDGMENT.

Domestic — action on.] An action may be maintained on a valid domestic judgment before the time to issue execution has expired. *Hummer v. Lamphear* (83 Kana. 439), 491.

JUDICIAL NOTICE.

See EVIDENCE, 200, 819; MARRIAGE, 813.

JURISDICTION.

See CRIMINAL LAW, 620.

JUSTICE OF PEACE.

See CONSTITUTIONAL LAW, 556.

LANDLORD AND TENANT.

1. **Distress — taking note for rent.]** A landlord, taking the negotiable note of his tenant for rent, may not distrain or sue for the rent until the maturity and non-payment of the note. *Hornbrooks v. Lucas* (24 W. Va. 498), 277.
2. **Tenant erecting building — election to renew or purchase.]** A lease provided that the lessee might erect a building, and that at the end of the term the lessor might elect to renew the lease, or to buy the building or sell the lot, at a price to be ascertained by arbitrators. The lessee built, but the lessor failed to elect. The lessee then elected to purchase the lot, but the lessor refused to join in an arbitration to fix the price. *Held*, that the lessee was entitled to equitable relief. *Coles v. Peck* (96 Ind. 383), 161.

LESSOR AND LESSEE.

See LANDLORD AND TENANT, 161.

LETTER.

See EVIDENCE, 508.

LIBEL.

1. **By religious society.]** In the absence of proof of malice, the members of a session of a Presbyterian church are not liable to an action of libel for excommunication from membership in the church for alleged falsehood. *Landis v. Campbell* (79 Mo. 433), 239.
2. **Newspaper — employee.]** The proprietor of a newspaper is liable for a libel published therein without his knowledge by the editor in charge. *Bruce v. Reed* (104 Penn. St. 408), 586.

On judge.] *See CONTEMPT, 257.*

See CRIMINAL LAW, 183; MARRIAGE, 489.

LICENSE.

To remove building.] The oral sale of a frame building with the right of removal authorizes the purchaser to enter on the land to remove it, and such license is irrevocable. *Rogers v. Cox* (96 Ind. 157), 152.

See CONTRACT, 581.

MALICIOUS PROSECUTION.

Does not lie without arrest of person or detention of property.] *Muldoon v. Rickey* (103 Penn. St. 110), 117.

See CORPORATION, 800.

MANURE.

See REAL PROPERTY, 833.

MARRIAGE.

1. **Acknowledgment — void divorce.]** A woman living under her maiden name, apart from her husband, under a void decree of divorce, and acting and representing herself as a single woman, binds herself by her acknowledgment of a deed as a single woman. *Reis v. Lawrence* (68 Cal. 129), 83.
2. **Conveyance by husband to wife.]** A voluntary deed of land direct from husband to wife, made in good faith, the husband not being in debt, will be sustained as against a subsequent creditor of the husband, although it was all the land he owned and a large proportion of all his property. *Thompson v. Allen* (103 Penn. St. 44), 116.
3. **Dower — value of inchoate, how ascertained — judicial notice.]** The value of a wife's inchoate right of dower must be ascertained by the "American Table of Mortality," and judicial notice will be taken of it. *Gordon v. Tweedy* (74 Ala. 232), 813.
4. **Liability of husband for wife's tort.]** A husband is not liable for slanderous words spoken by his wife without his participation. *Norris v. Corkill* (32 Kans. 409), 489.
5. **Wife's ante-nuptial will.]** A woman's ante-nuptial will is not revoked by her marriage. *Fellows v. Allen* (60 N. H. 439), 328.

Restraint of.] *See* WILL, 478.

See CONSTITUTIONAL LAW, 652; INFANCY, 381.

MASTER AND SERVANT.

1. **Authority of conductor to employ surgeon for injured brakeman.]** Where a railway brakeman is injured in the discharge of his duty at a point distant from the chief offices of the company, and stands in need of immediate surgical attendance, the conductor may bind the company by the employment of a surgeon, if there is no superior agent of the company present. *Terre Haute and Indianapolis Railroad Company v. McMurray* (98 Ind. 358), 752.
2. **— of railway road-master to contract for care of injured person.]** A railway road-master, having charge of the repairs of the roadway, has no implied authority to contract for the nursing of a person injured on the line of the road, there being no emergency calling for immediate action, and there being a superior agent within reach; but the corporation will be bound by the ratification of such contract by the general manager. *Louisville, Evansville and St. Louis Railway Company v. McVay* (98 Ind. 391), 770.

MASTER AND SERVANT — *Continued.*

3. **Contractor.]** The owner of land is not liable for injury by communication of a fire negligently set on his land by one contracting to clear the land. *Ferguson v. Hubbell* (97 N. Y. 507), 544.
4. **Co-servants — conductor, section foreman and trainmen.]** The conductor of a railway material train is not a fellow-servant of the trainmen; nor is a section foreman. *Moon's Administrator v. Richmond and Alleghany Railroad Company* (78 Va. 745), 401.
5. **— conductor and laborer.]** The conductor of a railway construction train and a gang of day laborers employed in such construction and under his orders are not fellow-servants. *Chicago, St. Paul, Minneapolis and Omaha Railway Company v. Swanson* (16 Neb. 254), 718.
6. **Servants ejecting trespasser from locomotive engine.]** Where a trespasser upon a railway locomotive engine was thrown off by the servants of the railway company, while the engine was moving at a dangerous speed, and run over and injured, the company is liable therefor. *Carter v. Louisville New Albany and Chicago Railway Company* (98 Ind. 552), 780.

See LIBEL, 586; MUNICIPAL CORPORATION, 118.

MEASURE OF DAMAGES.

See DAMAGES, 246.

MINES.

See TENANCY IN COMMON, 686.

MISTAKE.

See MORTGAGE, 487.

MORTGAGE.

Exception — mistake — evidence.] A mortgage was executed upon land, excepting "twenty acres from the north-east corner of said above described tract of land, formerly deeded to Wm. Davis and Emeline M. Davis." In an action to recover the said twenty acres, *held*, that parol evidence was admissible to show that the twenty acres intended to be excepted was not in the north-east corner, but off the south end. *Lanman v. Crooker* (97 Ind. 168), 487.

MUNICIPAL CORPORATION.

Nuisance — ditch in street — contractor.] A ditch dug in a street of a borough, to lay a water-pipe from a spring to a dwelling-house, by authority of a municipal license, is not necessarily a public nuisance, rendering the licensee liable for the negligence of an independent contractor in performing the work. *Smith v. Simmons* (108 Penn. St. 83), 118.

See CONSTITUTIONAL LAW, 416.

MURDER.

See CRIMINAL LAW, 188, 620.

NEGLIGENCE.

1. **Bridge over excavated sidewalk.]** When one duly licensed by the city authorities has removed a portion of a sidewalk to excavate for a vault, and has built a bridge over the excavation, necessarily higher than the street, he is not bound to make the bridge as safe for travellers as the sidewalk was, but only reasonably safe. *Nolan v. King* (97 N. Y. 565), 561.
2. **Contributory — boarding railway train.]** It is not necessarily negligent for a passenger to board a railway train at a place other than the station platform. *Stoner v. Pennsylvania Company* (98 Ind. 884), 764.
3. **— obstruction to highway.]** The defendant's cars had run off the track at a highway crossing. The plaintiff undertaking to drive a horse over the crossing, the horse showed fright at the upturned cars, but the plaintiff persisted, the horse ran and the plaintiff was injured. There was another road near which the plaintiff might have taken. *Held*, that he was guilty of contributory negligence. *Pittsburgh Southern Railway Company v. Taylor* (104 Penn. St. 806), 580.
4. **— presumption.]** One in the full possession of his faculties, who undertakes to cross a railroad track when a train of cars is about passing, and is struck by it, is *prima facie* guilty of negligence. *State v. Maine Central Railroad Company* (76 Me. 357), 622.
5. **— riding on top of car — low bridge.]** A railway brakeman was killed by collision with a low bridge while standing on top of a freight car in the night. He had been warned of the bridges, and had several times passed this bridge by daylight. *Held*, that there could be no recovery. *Clark's Administrator v. Richmond and Danville Railroad Company* (78 Va. 790), 394.
6. **— standing on bow of ferry-boat.]** It is not necessarily negligent for a passenger on a ferry-boat to stand near the bow while the boat is landing. *Peverly v. City of Boston* (136 Mass. 866), 37.
7. **— alighting from car.]** Where a railroad train overshoots a station and is stopped at a dangerous place in a dark night, it is not necessarily negligent for a passenger to alight. *Terre Haute and Indianapolis Railroad Company* (96 Ind. 346), 168.
8. **Imputable — parent and child.]** In an action by an infant for an injury by negligence, the parent's contributory negligence is not imputable to the child. *Huff v. Ames* (16 Neb. 189), 716.
9. **Joint enterprise.]** Defendant furnished team, wagon, etc., for carrying passengers, and McCann gathered the passengers and collected the fares, and the two divided the receipts in an agreed proportion. Plaintiff, while walking in a street, was run over by the team and wagon, negligently driven by McCann, defendant not being present. *Held*, that this action of damages would lie. *Stroher v. Elton* (97 N. Y. 102), 515.
10. **Pit near highway — animals running at large.]** In a county where stock lawfully ran at large, the defendant dug a well on his uninclosed land, near the highway, and left it uncovered and unfenced, and the plaintiff's horse running at large fell into it and was killed. *Held*, that defendant was liable. *Haughey v. Hart* (62 Iowa, 96), 188.

NEGLIGENCE — *Continued.*

11. Railroad — throwing mail-bags.] One waiting on the platform, at a railroad station, and injured by a mail-bag thrown from a train passing at high speed, such throwing being customary and well known to the company, may recover of the company therefor. *Snow v. Fitchburg Railroad Company*, (186 Mass. 553), 40.

See DAMAGES, 168 ; FERRY, 484 ; MASTER AND SERVANT, 718 ; RAILROAD, 540.

NEGOTIABLE INSTRUMENT.

1. Check — action by payee against drawee.] On an ordinary bank check for part of the drawer's deposit no action can be maintained by the payee against the drawee or its assignee before acceptance. *Dickinson v. Coates* (79 Mo. 251), 228.
2. Evidence of relations of parties — contribution.] In an action for contribution upon a promissory note purporting to be made by A. as principal, and the plaintiff and defendant as sureties, evidence is competent to show that the signers were joint makers by agreement. *Mansfield v. Edwards* (186 Mass. 15), 1.
3. Right of accommodation maker to contribution.] One of the several accommodation makers of a joint and several promissory note paid it, and afterward transferred it for value to a third person. *Held*, that the transferee could maintain an action for contribution against the other makers, although he paid the full face, the transferor paid the full interest for several years, and the transferee proved the note for the full amount against the transferor in bankruptcy, and received and credited a dividend. *Dillenbeck v. Dygert* (97 N. Y. 808), 525.
4. Transfer — equities.] An indorser of an accommodation note before maturity having transferred the note after maturity, and himself not being affected by equities between the original parties, his transferee takes the note free from such equities. *Bank of Sonoma County v. Gove* (68 Cal. 855), 92.

Notes, gift of.] See WILL, 449.

NOTES.

Boundary — on river shore, 812.

Deed — consideration — illicit intercourse, 49.

Evidence — practical tests — exhibition of clothing, etc., 191, 726.

— expert — matter of common knowledge, 554.

— judicial notice, 201.

— negligence — presumption of, 628.

— nuisance — fright of horses, 613.

Injunction — against tax sale of chattels, 287.

Insurance — condition against sale — sale by one partner to another with mortgage back, 22.

Marriage — acknowledgment of deed — void divorce, 87.

— wife's ante-nuptial will — revocation by marriage, 829.

NOTES — *Continued.*

Master and servant — fellow servants — conductor and trainmen, 406.

Negligence — contributory — standing on bow of ferry-boat, 89.

—— railroad — throwing mail-bags, 41.

Partnership — what constitutes, 255.

—— assignment by surviving partner, 851.

Pledge — creditor's duty as to collaterals, 595.

Statute of limitations — promise to pay "when able," 847.

Telegraph — eminent domain — compensation to owners, 14.

Trial — physical examination of plaintiff, 726.

Will — separate paper as part of, 454.

NUISANCE.

1. **Injunction — keeping of jacks and stallions.]** The keeping of jacks and stallions and standing them for mares near and in plain view of an inhabited dwelling-house may be prohibited by injunction. *Farrell v. Cook* (16 Neb. 488), 721.

2. **Slaughter-house.]** The operation of a slaughter-house in a populous locality is *prima facie* a nuisance, and may be restrained at the suit of neighboring residents injured thereby. *Reichert v. Geers* (98 Ind. 78), 786.

See CONSTITUTIONAL LAW, 27; EVIDENCE, 611; MUNICIPAL CORPORATION, 118.

OFFICE AND OFFICER.

Of corporation — liability for money stolen.] The secretary of a corporation, bound to receive its moneys and pay them over to the treasurer, is liable for such moneys stolen from him if he failed to use reasonable diligence in paying them over. *Odd Fellows' Mutual Aid Association of San Francisco v. James* (68 Cal. 598), 107.

See STATUTE, 700.

PARDON.

1. **Conditional.]** Where a pardon is granted on condition that the prisoner leave the State and never return, and upon his promise to comply, he may be re-arrested if he has had ample opportunity to leave the State and has not done so. *Ex parte Marks* (64 Cal. 29), 684.

2. **Delivery and acceptance.]** A pardon delivered to a warden of the penitentiary, directing him to restore the convict to liberty, is effectual and irrevocable, although at the time of delivery the convict was not in the penitentiary, but in jail, subject to the warden's orders, and awaiting removal. *Ex parte Powell* (78 Ala. 517), 71.

3. **Effect as to second offense.]** When an additional punishment is prescribed for a second offense, pardon of the first offense takes away the right to inflict it. *Edwards v. Commonwealth* (78 Va. 89), 877.

PARENT AND CHILD.

In loco parentis — action for loss of service and expenses.] Where an infant dies by the negligence of another, one standing *in loco parentis* may recover from him for medical expenses and for actual loss of service up to the time of the death. *Whitaker v. Warren* (60 N. H. 20), 802.

See INFANCY, 567 ; NEGLIGENCE, 716.

PARTITION.

Of remainder.] Partition cannot be had of an estate in remainder. *Wood v. Sugg* (91 N. C. 98), 639.

PARTIES.

See EASEMENT, 533.

PARTNERSHIP.

1. **Interest in profits for services.]** An agreement that an employee shall have a specified share of the profits of the business for his services does not constitute a partnership. *Sodiker v. Applegate* (24 W. Va. 411), 252.
2. **Paying individual debt with firm property.]** One partner, individually indebted to a person owing the firm, may not apply the debt due the firm to the payment of his own debt, without consent or ratification by his co-partners, and the debtor to the firm is still liable therefor. *Thomas v. Stetson* (62 Iowa, 537), 148.
3. **Retiring partner — evidence — admission of remaining members.]** In an action against a retired partner for a debt contracted by the remaining members, in the same firm name, on the ground of the want of notice or knowledge of the dissolution, the account as entered on the ledger of the new firm is not evidence against the defendant. *Pringle v. Leverich* (97 N. Y. 181), 522.
4. **"Shares" in a business.]** Unincorporated persons taking certain numbers of "shares," "for the purpose of starting a grocery store," are partners between themselves, although they called themselves "stockholders" and their opinion was that there was no liability for losses beyond the amount paid for the shares. *Farnum v. Patch* (60 N. H. 294), 813.
5. **Statute — "& Co." representing no actual partners.]** A bond was executed to "John Gay and Charles Gay, Jr., doing business as Gay Brothers & Co." They were, as the obligors knew, the only partners. *Held*, not within the statute prohibiting the transaction of business in the name of a partner not interested, and requiring the designation "& Co." to represent an actual partner, under penalty as a misdemeanor for non-observance. *Gay v. Seibold* (97 N. Y. 472), 533.
6. **Surviving partner — assignment for creditors.]** The surviving partner of an insolvent firm may make a general assignment for creditors without preferences. *Salsbury v. Ellison* (7 Colo. 167), 347.
7. **Use of firm name by purchaser — liability of former member.]** Where one who has carried on business alone, under a firm name, sells the busi-

PARTNERSHIP — *Continued.*

ness to his son, who continues the business under the same name, the former is liable for goods purchased by the latter from an actual dealer with the former, who has no knowledge or notice of the transfer. *Hilterson v. Leeds* (97 Ind. 886), 458.

See EVIDENCE, 94; INSURANCE, 20; NEGLIGENCE, 515.

PEDIGREE.

See EVIDENCE, 615.

PENALTY.

See STATUTE, 655.

PLEDGE.

Creditor's duty as to collaterals.] The plaintiff assigned to the defendant two promissory notes as collateral security. The defendant got judgment on the notes, and sold the maker's real estate of the judgment on execution, without the knowledge of or notice to the plaintiff, for about one-twentieth of its value; the defendant's minor daughter bidding it in at his suggestion, there being no other bidders present. The defendant afterward got judgment against the plaintiff for the balance. In a suit to restrain the collection of that judgment, *held*, that the defendant must be restrained and account for the loss. *McQueen's Appeal* (104 Penn. St. 596), 592.

PRESCRIPTION.

See EASEMENT, 588.

PRESUMPTION.

See NEGLIGENCE, 622.

PRINCIPAL AND AGENT.

See AGENCY.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENT.

PROXIMATE CAUSE.

See DAMAGES, 168, 668.

PUBLIC POLICY.

See CONTRACT, 181, 746.

RAILROAD.

1. **Ejection for non-payment of fare.]** The plaintiff took passage on the defendant's railway for a station four miles distant. He depended on a friend taking passage at the same time to pay his fare, but that person got into another car. When the conductor demanded his ticket he told him he had neither ticket nor money, but would go into the other car and get the money from his friend. The train was midway between the stations. The conductor refused to delay, and put him off. *Held*, that he could recover damages. *Clark v. Wilmington and Weldon Railroad Company* (91 N. C. 506), 647.

PARENT

In loco parentis — action for loss of child if infant dies by the negligence of parent to recover from him for medical expenses from the time of the death. *W7*

See INFANT

See **Waiting on the platform** — mail-bag thrown from the employ of the mail-known form.

and

Of remainder.] Partition
Sugg (91 N. C. 98),

SERVANT, 384, 401, 752, 764, 770,
168, 394.

PROPERTY.

not made in the course of husbandry, but made by using hogs, not fed upon the products of the land, and mixed with loam drawn from other lands, is not property. *Snow v. Perkins* (60 N. H. 493), 383.

1. Interest in

have a
not or

RECOGNIZANCE

See CONTEMPT, 505.

2. Pay

in

RELIGIOUS SOCIETY.

Removal of bishop removing priest.] No action lies by a Catholic priest against his bishop for removing him from his office. *O'Donovan v. Chatard* (97 Ind. 481), 462.

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Expulsion from church.] A religious society cannot be compelled to reinstate a member expelled from the church, where the expulsion was not by an act of the corporation and did not affect any interest in property. *Sale v. First Regular Baptist Church of Mason City* (62 Iowa, 26), 186.

See LIBEL, 239.

REMAINDER.

See PARTITION, 639.

REPLEVIN.

See EXECUTION, 517; FIXTURES, 710.

RESTRAINT OF MARRIAGE.

See WILL, 478.

RESTRAINT OF TRADE.

See CONTRACT, 427.

SALE.

1. Warranty — patent defects.] On the sale of a patent right to a churn, manufactured by the seller, he exhibited a sample of it, stating that it would produce butter in from three to five minutes; could be operated by

SALE — *Continued.*

a child five or six years old ; that it was made of juniper wood, and that the dasher was nickel-plated; whereas in fact it would not produce butter in less than ten minutes, was too heavy for children to work it; was made of white pine and painted, and the dasher was of polished iron. *Held*, a valid warranty, and that the court could not pronounce the discrepancies so plain and obvious as to avoid it. *Tabor v. Peters* (74 Ala. 90), 804.

2. **When title passes.]** A stock of goods, old and new, was sold, the new at invoice prices, the old at prices to be agreed on at a fixed time, the purchaser giving his notes for the estimated price of the whole, to be increased or diminished according to the eventual agreement as to the old goods. The goods were delivered. Before any agreement as to the price of the old goods a creditor of the seller attached the goods. *Held*, that title had passed and the creditor got no lien. *Shealy v. Edwards* (73 Ala. 175), 43.

SIDEWALK.

See NEGLIGENCE, 561.

SLAUGHTER-HOUSE.

See NUISANCE, 736.

STAKEHOLDER.

See WAGER, 816.

STATUTE.

1. **Ambiguity.]** A statute prohibited the sale of spirituous liquors within three miles of Mount Zion church in Gaston county. There were two churches of that name in that county. *Held*, inoperative. *State v. Partlow* (91 N. C. 550), 652.
2. **Construction — bribery.]** A police officer, taking money in consideration of his promise not to arrest a certain class of offenders, is guilty of receiving a bribe under a statute denouncing the receiving of a bribe by any executive officer in a matter which “ may be brought before him in his official capacity.” *People v. Markham* (64 Cal. 157), 700.
3. ———“**decrepit.**”] In a statute concerning assault and battery upon “ decrepit persons,” those words mean those who are disabled, incapable or incompetent, from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render them comparatively helpless in personal conflicts with persons of ordinary health and strength. *Hall v. State* (16 Tex. Ct. App. 6), 824.
4. ———“**movable property.**”] A growing and unripe crop is not “ movable” or “ personal property.” *Hardeman v. State* (16 Tex. Ct. App. 1), 821.
5. ———**penalty.]** A statute provides a penalty against any railroad company for failure during any trip to announce the stopping places. *Held*, that only one penalty can be recovered up to the time of suit. *Parks v. Nashville, Chattanooga and St. Louis Railway* (13 Lea, 1), 655.

STATUTE — *Continued.*

6. — **Sunday.]** Where the last day for the performance of an act by statute falls on Sunday, it may be done on the next day. *Edmundson v. Wragg* (104 Penn. St. 500), 590.

See CONSTITUTIONAL LAW, 641 ; PARTNERSHIP, 583.

STATUTE OF LIMITATIONS.

1. **Fraud.]** Where a debtor disclosed to the administrator of his creditor the fact of his indebtedness, but omitted to state the amount, this is not such fraudulent concealment as will toll the statute of limitations. *Sankey v. McElvey* (104 Penn. St. 265), 575.
2. **Promise to pay "when able."]** A promise to pay a debt against which the statute of limitation has run, "when able," is conditional, and the creditor must prove the happening of the condition. *Richardson v. Bricker* (7 Colo. 58), 344.

STOCK.

Certificate—stolen.] *See* CORPORATION, 705.

STREET.

See MUNICIPAL CORPORATION, 113, 561 ; HIGHWAY.

SUNDAY.

See CONSTITUTIONAL LAW, 290 ; STATUTE, 590.

TAXATION.

Of chattels — ownership by non-resident.] Chattels purchased in one State by a citizen of another, and remaining in the former to receive a finishing process of manufacture, are taxable in the State where purchased. *Standard Oil Company v. Combs* (96 Ind. 179), 156.

See INJUNCTION, 283.

TELEGRAPH.

See EMINENT DOMAIN, 7.

TENANCY IN COMMON.

Of mine — waste — injunction.] When one of the several tenants in common of a mine is working it in the usual way, and not excluding his cotenants, he may not be called to account to them in an action for damages as for waste, nor restrained from thus working the mine. *McCord v. Oakland Quicksilver Mining Company* (64 Cal. 134), 686.

Adverse possession.] *See* ADVERSE POSSESSION.

TRADE-MARK.

1. **"Philadelphia beer."]** A business sign with a row of beer barrels painted on it, with the letters "P. B." on the heads, the words "Depot of the Celebrated" above, and the words "Philadelphia Beer" below, cannot be protected as a trade-mark *per se*. *Eggers v. Hink* (63 Cal. 445), 96.
2. **"Samaritan."]** "Samaritan" is not a valid trade-mark on medicines. *Desmond's Appeal* (103 Penn. St. 126), 118.

TRIAL.

1. **Failure to condemn applause of spectators — comments of counsel.]** On a murder trial, at the end of the opening address of the prosecuting attorney, the audience applauded. In his closing argument he alluded to this, and approved it. The court did not check nor reprimand the audience nor the counsel, nor caution the jury. This, it seems, was error. *Cartwright v. State* (16 Tex. Ct. App. 473), 826.
2. **Physical examination of plaintiff.]** On the trial of an action of damages for a personal injury, the court may refuse to order the plaintiff to submit to a physical examination by the defendant's medical witnesses, in private, it not appearing to be necessary, and the plaintiff having already submitted to an examination by such witnesses in the presence of the jury. *Sioux City and Pacific Railroad Company v. Finlayson* (16 Neb. 578), 724.

TRUST.

See WILL, 884.

VENDOR AND PURCHASER.

Ejectment.] Ejectment will lie against one in possession of land under a contract of purchase, who refuses fully to perform on his part. *Hicks v. Lovell* (64 Cal. 14), 679.

See FIXTURES, 710.

WAGER.

Action against stakeholder.] Where a wager is made on the result of a public election, and the stakeholder pays the stake after the result is generally known and publicly announced, but before the issue of the official certificate, the loser, having after the payment but before the issue of the certificate notified him not to pay, may maintain an action against him for his stake. *Lewis v. Bruton* (74 Ala. 317), 816.

WAREHOUSMAN.

Storage of grain — fire.] Where a warehousman receives grain on storage, and puts it in a bin with his own and that belonging to others, and sells therefrom, always reserving enough to answer the demand of each owner, he is not liable to the depositors for loss by fire not attributable to his fault. *Rice v. Nixon* (97 Ind. 97), 430.

WARRANTY.

See SALE, 804.

WASTE.

See TENANCY IN COMMON, 686.

WATER AND WATER-COURSE.

Mussel-bed.] A mussel-bed, between which and the shore no water flows at low tide, belongs to the owner of the adjacent shore. *King v. Young* (76 Me. 76), 596.

See BOUNDARY, 311, 609.

WILL.

1. **Agreement as to a bank deposit.]** An agreement between two savings-bank depositors, that the survivor shall have the other's deposit, not being executed according to the statute of wills and each retaining control during his life, is invalid. *Toule v. Wood* (60 N. H. 434), 326.
2. **Charitable devise.]** A devise to one for life, providing that what remains at his death he shall devise "to the support and management of such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith" as he may determine, is valid. *Quinn v. Shields* (62 Iowa, 129), 141.
3. **Knowledge of contents.]** The testator's knowledge of the contents of the will may be shown by circumstances. *Montague v. Allan's Executors* (78 Va. 592), 384.
4. **Interested draftsman.]** A will is not invalidated by the facts that it was drawn by a confidential friend of the testator and that his wife was a beneficiary. *Id.*
5. **Notes as part of.]** Notes made by a testator, payable at his death, folded up with his will, referred to and clearly identified therein, and remaining in his possession at his death, are a part of the will. *Fickle v. Snepp* (97 Ind. 289), 449.
6. **Restraint of marriage.]** A devise to the testator's wife "so long as she shall remain my widow" is not in restraint of marriage. *Hibbits v. Jack* (97 Ind. 570), 478.
7. **Trust for charity.]** A trust to executors to distribute a residuum among the testator's relatives and for benevolent objects, in such sums as they shall deem best, is valid. *Goodale v. Mooney* (60 N. H. 528), 334.

Ante-nuptial.] See MARRIAGE, 328.

See MARRIAGE, 328.

WITNESS.

Cross-examination — inculcation.] Where a plaintiff has testified in his own behalf in a suit for personal injury by a defective sidewalk, it is discretionary to allow him to be asked on cross-examination whether he had not combined with others several years before to defraud an insurance company, he not claiming his privilege. *City of South Bend v. Hardy* (98 Ind. 577), 792.

Restoring competency of infamous.] See CONSTITUTIONAL LAW, 218.

See ARREST, 598 ; CRIMINAL LAW, 629 ; TRIAL, 724.

WORDS.

"Decrepit."] See STATUTE, 824.

"Fugitive."] See EXTRADITION, 63.

"Justice or judge."] See CONSTITUTIONAL LAW, 556.

"Movable property."] See STATUTE, 821.

"Roadway — roadbed."] See CONSTITUTIONAL LAW, 98.

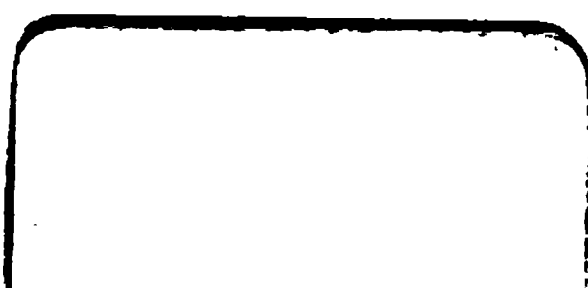
"Violation of law."] See INSURANCE, 469.

"When able."] See STATUTE OF LIMITATIONS, 344.

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